



Terms and Conditions of Trade

To the fullest extent legally possible all contracts, dealings and/or arrangements made between Kelair Pumps Australia Pty. Limited ACN 001 308 381 and each of its subsidiaries, affiliates, associated companies and related entities ("**Kelair**") and any customer ("**Customer**") relating to any goods, services or transactions are subject to the following Terms and Conditions of Trade ("**Terms**") unless otherwise agreed in writing.

1. **Payments and Interest:**

- (a) Payment is to be by cash, cheque, or electronic funds transfer without set-off or deduction of any kind, within 30 days from the end of month of invoice date.
- (b) Kelair may apply a payment received from the Customer to any amounts owed by the Customer (including interest, part payment of an invoice, administration, collection and other costs) in any order.
- (c) Kelair is entitled to set-off or deduct any amount payable by Kelair (or any of its subsidiaries, affiliates, associated companies and related entities) to the Customer.
- (d) A payment dishonour fee may be charged by Kelair if a Customer's payment is dishonoured in any way.
- (e) Interest is payable on overdue accounts at a rate prescribed under the *Penalty Interest Rates Act 1983* (Vic) plus an additional 3% calculated monthly in advance.
- (f) Before supplying the Customer with goods or services, Kelair may at Kelair's discretion require all or any of the following:
 - (i) payment in advance;
 - (ii) a guarantee of payment;
 - (iii) a deposit;
 - (iv) progress payment; or
 - (v) a letter of credit.

2. **Retention of Title and liability for goods:**

- (a) Property in goods will not pass until payment in full of all monies owed to Kelair on any basis ("**Full Payment**").
- (b) Kelair reserves the right to take possession and dispose of goods as it sees fit at any time until Full Payment and the Customer grants permission to Kelair to enter any property (whether owned by it or otherwise) where any goods are, in order to do so and with such force as is necessary.
- (c) Immediately upon delivery the Customer accepts liability for the goods.
- (d) A document signed by an officer of Kelair identifying goods and certifying that monies are owing to Kelair will be conclusive evidence of Kelair's title thereto.
- (e) Upon sale or disposition of goods prior to Full Payment the Customer agrees to hold all proceeds Upon Trust for Kelair in a separate bank account, agrees not to mix proceeds with any other monies and will immediately account to Kelair therefore even if Kelair may have granted any credit facility and/or time to pay. Failure by the Customer to comply with this subclause does not render invalid the trust to be established under this subclause.
- (f) Until Full Payment the Customer agrees:

- (i) to keep all goods as fiduciary for Kelair and to store them in a manner which:
 - A. shows Kelair as owner; and
 - B. will keep them safe and free from deterioration, destruction, loss or harm.
- (ii) only to sell goods in the usual course of business; and
- (iii) sale on terms, at cost or less than cost will not be "in the usual course".
- (g) This clause 2 is not intended to create a charge and must be read down to the extent necessary to avoid being a charge.
- (h) If the Customer uses or incorporates any goods in any production, process or manufacture or combines them with anything to create a finished or combined new thing for disposition then upon such disposition prior to Full Payment, the Customer agrees to hold such part of the proceeds thereof (and until payment is received by the Customer, that part of any applicable book debt) as equals the costs of the goods used and/or incorporated therein (at the prices invoiced by Kelair to the Customer) Upon Trust for Kelair until Full Payment.

3. **Claims:**

To the extent permissible at law (including under the Australian Consumer Law Schedule 2 of the Competition and Consumer Act 2010 ("**Australian Consumer Law**")):

- (a) Kelair will not be liable for any claim arising after 7 days from delivery of goods or performance of services (or at all once goods have been unpacked, modified, on-sold or otherwise used or applied) after which there will be deemed to be unqualified acceptance;
- (b) Kelair will not be liable in any way for any contingent, consequential, direct, indirect, special or punitive damage arising whether due to Kelair's negligence or otherwise and the Customer acknowledges this limit of liability and agrees to limit any claim accordingly;
- (c) no other term, condition, agreement, warranty, representation or understanding whether express or implied in any way extending to or otherwise relating to or binding upon Kelair is made or given except where done so in writing and signed by an authorised officer of Kelair; and
- (d) Kelair will not be liable for any claim relating to or arising from any alleged fault or defect caused or contributed to by the Customer or any third party.

4. **Returns:**

To the extent permissible at law (including under the Australian Consumer Law):

- (a) if Kelair elects to take back product it must be in as new and saleable condition and upon terms agreed

- and a re-stocking fee of \$50 or 15% of invoice value (whichever is the greater) will apply in order to cover refurbishing, repacking and accounting and administration;
- (b) custom made or custom processed goods or goods acquired by Kelair specifically for the Customer will not be returnable;
- (c) any goods which are accepted by Kelair as defective may be returned and will be repaired, replaced or a refund provided in accordance with clause 40(b); and
- (d) the Customer must when returning goods, provide Kelair with a full description of conditions under which the alleged failure occurred and why the goods are alleged to be defective.
- 5. Placement of Orders:**
- (a) To the extent permissible at law (including under the Australian Consumer Law), if any dispute arises concerning any order including without limitation, any measurement, quality, quantity, identity, or authority or any telephone, facsimile, e-mail or computer generated order, the internal records of Kelair will be conclusive evidence of what was ordered except in the case of manifest or obvious error.
- (b) The Customer warrants that it will not place an order with Kelair unless it is solvent and able to pay all of its debts as and when they fall due.
- 6. Delivery:**
- (a) To the extent permissible at law (including the Australian Consumer Law), Kelair accepts no responsibility for delivery but may elect to arrange delivery at its discretion and without any liability and at the Customer's costs and responsibility in all things.
- (b) Kelair reserves the right to charge for any delivery.
- (c) The Customer will be deemed to have accepted delivery and liability for the goods immediately Kelair notifies that they are ready for collection or when they are delivered to a carrier or to the Customer's business premises or site whether attended or not.
- (d) A document (including without limitation a consignment note) purporting to be signed by an officer of Kelair confirming delivery will be conclusive evidence of delivery as will any signed delivery docket.
- (e) To the extent permissible at law (including the Australian Consumer Law), Kelair will not be liable for delay, failure or inability to deliver any goods.
- (f) Once the Customer has been notified that goods are ready for collection, the Customer agrees to pay all costs of holding or handling goods.
- (g) The Customer agrees to pay all costs and expenses arising from frustrated or delays in delivery.
- (h) The Customer agrees that Kelair may invoice the Customer for goods that are ready for delivery, notwithstanding that the Customer may have requested Kelair to delay delivery;
- (i) To the extent permissible at law (including the Australian Consumer Law) Kelair may unilaterally delay, cancel or suspend any delivery for any period or cancel any agreement for sale without any liability to any party.
- 7. Variation:**
Variation or cancellation of any order, dealing or arrangement must be agreed in writing by Kelair.
- 8. Exclusions:**
To the extent permissible at law (including under the Australian Consumer Law):
- (a) no dealing with the Customer will be or be deemed to be a sale by sample or description;
- (b) if Kelair publishes material about its goods and prices, any part which is incompatible with these Terms is expressly excluded;
- (c) the Customer will rely on its own knowledge and expertise in choosing any product for any purpose; and
- (d) any advice or assistance given for or on behalf of Kelair must be accepted at the Customer's risk and must not be or be deemed given as expert or adviser nor to have been relied upon.
- 9. Severability:**
If a provision of these Terms would but for this clause be unenforceable, that provision must be read down to that extent necessary to avoid that result and if that provision cannot be read down to that extent, it must be severed without altering the validity and enforceability of the remainder of these Terms.
- 10. Purchase Price:**
- (a) All sales are made by Kelair at its ruling price at the time of delivery unless otherwise agreed in writing by Kelair.
- (b) All Government imposts and any GST ("**Imposts**") will be to the Customer's account. Kelair's price lists exclude Imposts unless expressly noted thereon.
- 11. Default:**
To the extent permissible at law (including under the Australian Consumer Law) default or breach by the Customer of these Terms or in any dealings with Kelair will entitle Kelair to retain all monies paid, call-up all monies due or owing (whether currently due and owing or not), cease further deliveries, recover from the Customer all loss of profits and/or take immediate possession of any goods, without prejudice to any other of its rights and without liability to any party.
- 12. Products and Services:**
- (a) To the extent permissible at law (including under the Australian Consumer Law), Kelair disclaims any responsibility or liability whatsoever relating to suitability for any particular purpose or process unless it otherwise agrees or states in writing
- (b) The Customer agrees to check all goods prior to use, alteration or any application whether in relation to suitability for any particular purpose, process or otherwise.
- (c) The Customer agrees to check and test all goods for compliance with all relevant applicable standards and regulatory bodies before use, on-sale or application and to use or apply same in accordance with all applicable standards, regulations and guidelines, with all manufacturers and/or Kelair recommendations and directions as well as with good commercial practice.
- (d) Kelair may update, modify, make substitution or alter any of its goods or any component or raw material incorporated in or used in forming any part of any goods as part of its ongoing business. The Customer agrees to accept current goods in substitution for any

goods ordered provided they are not materially different.

- (e) To the extent permissible at law (including under the Australian Consumer Law), Kelair disclaims any responsibility or liability relating to any goods:
- (i) processed or made to designs, drawings, specifications or measurements etc. or with materials which are provided or approved (whether in part or fully) by or on behalf of the Customer; and/or
 - (ii) utilised, stored, handled or used incorrectly or inappropriately by the Customer or a third party.

13. Warranties:

(a) To the extent permissible at law (including under the Australian Consumer Law) and subject always to the other provisions of these Terms (including without limitation clauses 13(b), 38 and 40) all goods sold by Kelair carry a warranty against defective workmanship and materials. Unless otherwise specified, this warranty shall extend for a period not exceeding 12 months from the date of invoice or that extended to Kelair by Kelair's suppliers. The warranty against faulty workmanship and materials on service and/or repairs supplied by Kelair will extend to a maximum of 30 days from completion of the service and/or repair.

(b) Except to the extent:

- (i) of the warranty under clause 13(a);
- (ii) of any other applicable written warranty (if any) given by Kelair to the Customer; or
- (iii) as otherwise required by law including the Australian Consumer Law,

all warranties and representations including those expressed or implied by law, in respect of goods sold or services supplied, are excluded.

(c) Subject to clause 13(b), Kelair shall not be liable:

- (i) where the Customer has altered or modified the goods, misapplied the goods, or have subjected them to any unusual or non-recommended use, servicing or handling;
- (ii) for loss caused by any factors beyond Kelair's control;
- (iii) for second hand goods (provided that the Customer is made aware that the goods it is acquiring is second hand goods);
- (iv) where the terms of any written warranty or any manufacturers' handbook provided to the Customer has not been complied with;
- (v) for normal wear and tear;
- (vi) where electrical goods have not been used on the correct electrical current or not in the manner or not for the duty recommended by Kelair;
- (vii) for failure or damage to pumping equipment caused by sand or any abrasive material; or
- (viii) for repairs or jobs using Customer supplied material.

14. Other Terms and Conditions and Notice:

(a) Terms and/or conditions sought to be imposed by the Customer upon Kelair will not apply unless agreed in writing by Kelair. This includes where the Customer attempts to impose its terms and conditions upon Kelair by attaching them, referring to them or

otherwise attempting to incorporate them in any purchase order and any such attempt will be deemed invalid. In no circumstances will Kelair be deemed to have agreed to the Customer's terms and conditions by accepting or otherwise actioning a Customer's purchase order – no matter what a purchase order stipulates to the contrary.

(b) Kelair may change these Terms at any time without notice. Any amendment will be effective immediately. The placement of an order with Kelair after any amendment constitutes an agreement by the Customer to comply with and be bound by the amended terms. The most up to date version of these Terms will be available at Kelair's website at www.kelairpumps.com.au ("Link"). Accordingly, the Customer should read the Terms at the Link from time to time for changes and prior to each placement of an order with Kelair.

15. Recovery Costs:

The Customer agrees to pay (on a full indemnity basis) all costs and expenses of Kelair, its legal advisers, mercantile agents and others acting on its behalf in respect of anything instituted or being considered as a result of any breach of these Terms or breach of any dealings with Kelair.

16. Attornment:

To give effect to its obligations arising under these Terms (and especially clause 21) the Customer hereby irrevocably appoints any director of Kelair from time to time, as its attorney.

17. Customer Restructure:

(a) The Customer will notify Kelair of any change in its structure or management including any sale or disposition of any part of the business of the Customer, any change in director, shareholder, management, partnership or trusteeship or sale of any material part of its business ("**Restructure**") within 7 days of any such change.

(b) The Customer agrees it will:

- (i) cause any new entity created by virtue of a Restructure ("**New Entity**") to be bound by these Terms; and
- (ii) continue to be bound by these Terms despite a Restructure and will indemnify Kelair for any loss or damage it suffers as a result of a breach of these Terms by the New Entity.

18. Jurisdiction:

All contracts made with Kelair shall be deemed to be made in the State of Victoria and the parties submit to the jurisdiction of the appropriate Courts in or nearest Melbourne.

19. Credit Limit:

Kelair can vary or withdraw any credit facility or limit it at any time at its discretion and without any liability to the Customer or any other party.

20. Waiver:

If Kelair elects not to exercise any rights arising as a result of breach of these Terms it will not constitute a waiver of any rights relating to any subsequent or other breach.

21. Security for Payment:

The Customer agrees that:

- (a) despite anything to the contrary contained herein or any other rights which Kelair may have howsoever, where the Customer is the owner of property (tangible or intangible), land, realty or any other asset capable of being charged and/or over which a security interest may be created ("**Asset**"), the Customer agrees, upon Kelair's written request, to mortgage and/or charge all of their joint and/or several interest in the Asset to Kelair to secure all amounts and other monetary obligations payable by the Customer to Kelair;
- (b) If Kelair has any concerns regarding the safety of Kelair's employees or contractors in relation to the access and use of the Customer's property, Kelair shall be entitled to halt all work on the Customer's property until such time as Kelair's safety concerns have been resolved to Kelair's satisfaction. In that case the Customer shall be responsible for payment of work undertaken by Kelair to that point.

25. Customer Material:

The Customer agrees that:

- (a) it has sole responsibility to ensure that materials, designs, drawings, specifications, procedures etc. which are provided by or on behalf of the Customer, to be used by Kelair in meeting any orders, are correct and appropriate in every particular; and
- (b) any of its materials or property used by Kelair in the production of any goods or the provision of any services shall be at the Customer's risk in all things and be of merchantable quality and fit for the purpose.

26. Specifications:

- (a) To the extent permissible under law (including the Australian Consumer Law), any illustration drawing or specification supplied by Kelair ("**Specs**") are drafts and approximates and are for illustration purposes and the Customer should not rely on the accuracy of such Specs in any way.
- (b) Any tangible or intellectual property rights in Specs remain the property of Kelair and may be recalled at any time.
- (c) Specs are to be treated at all times as confidential and not made use of without the prior written consent of Kelair.

27. No Set-Off:

To the extent permissible at law (including under the Australian Consumer Law), no set-off or counterclaim may be made or applied by the Customer until payment in full of all bona fide invoices raised by Kelair (whether current or overdue) and this clause may be pleaded as a bar to any action taken prior to such payment in full.

28. Trusts:

The Customer agrees that these Terms binds it not only in its own capacity but also as the Trustee of every trust of which it is a trustee.

29. No Merger:

Termination of these Terms and/or dealings between the Customer and Kelair ("**Cessation**") will not end those provisions of these Terms that are capable of surviving Cessation.

30. Stock Discretion:

Kelair has a continuing discretion to allocate available stock and gives no warranty as to certainty of supply unless expressly agreed in writing in advance.

31. Partial Delivery/Forward Orders:

If the Customer places forward orders or request partial or instalment delivery, the Customer agrees:

- (a) to pay for so much of any order as is from time to time delivered by Kelair; and
- (b) that no delay or failure to fulfil any part of any order will entitle the Customer to cancel or vary any order or delay or reduce any payment.

32. Acceptable Variation:

- (c) it will execute any documents and to do all things requested by Kelair to register a mortgage (or such other security Kelair requires) over any current or later acquired real property the Customer has an interest in;
- (d) it consents unconditionally to Kelair lodging a caveat noting Kelair's interest in any current or later acquired real property the Customer has an interest in; and
- (e) any officer of Kelair may (without limitation) sign documentation to effect the Customer's compliance with this clause 21 by virtue of the provisions of clause 16.

22. Force Majeure:

Kelair will not be in default or breach of any dealing with the Customer as a result of an event of force majeure or anything beyond Kelair's reasonable control.

23. Intellectual Property:

- (a) If Kelair utilises any design, patent or intellectual property or follows any instruction provided by or on behalf of the Customer, the Customer indemnifies Kelair against any claim, proceeding, damages or liability for any loss, cost or expense arising as a result whether for any alleged infringement of any intellectual property or otherwise.
- (b) The Customer must not advertise, use or represent any intellectual property of Kelair or of any goods themselves in any way without the prior written consent of Kelair.
- (c) If the Customer breaches or permits any breach of this clause, it acknowledges Kelair may suffer claims by third parties as a result (e.g.: by models who's images are reproduced without authority and/or by parties who are entitled to exploit any intellectual property) and clause 33 will apply.
- (d) Kelair will be and be deemed the owner of any intellectual property it creates or contributes to and delivery thereof to the Customer or at the Customer's direction will only be and be deemed to be a licence to use any such intellectual property but only after all monies due to Kelair from the Customer are paid in full.

24. Compliance with Acts and Regulations:

- (a) Where the Customer grant access to Kelair over the Customer's property for the purposes of Kelair providing goods or services to the Customer, the Customer must ensure compliance with all legislation and regulations in relation to the property, including ensuring the property is in a safe state for Kelair and its employees to undertake any necessary work.

The Customer will accept variation in quantities at plus or minus 5% and will pay pro-rata for the actual quantity delivered.

33. Indemnity:

To the extent permissible at law (including under the Australian Consumer Law), the Customer indemnifies Kelair against any claim or loss arising from or related in any way to any contract or dealing between Kelair and the Customer or anything arising there from or arising as a result of or subsequent to any breach of these Terms by the Customer.

34. Insolvency:

If the Customer commits or is involved in any act of insolvency, it will be deemed in default under these Terms. An act of insolvency includes bankruptcy, liquidation, receivership, administration or the like and failure to pay in accordance with these Terms.

35. Exports:

Exports of any goods are governed by these Terms and all international trade conventions and/or terms including but not limited to the United Nations Convention on Contracts for the International Sale of Goods (known as the Vienna Sales Convention 1980) are expressly excluded unless otherwise stipulated in these Terms or on Kelair's invoice for the goods.

36. Personal Property Securities Act 2009:

(a) The Customer acknowledges that these Terms create a security interest under the Personal Property Securities Act 2009 ("PPSA") in favour of Kelair in all goods supplied by Kelair to the Customer (and all goods previously supplied by Kelair to the Customer), and for avoidance of doubt, the proceeds of sale of those goods.

(b) The Customer consents to Kelair effecting a registration on the PPSA register (in any manner Kelair considers appropriate) in relation to any security interest contemplated by these Terms (including but not limited to an interest under clause 2 in relation to retention of title) and further agrees:

- (i) to do all things necessary and required by Kelair to make sure that the security interest is a perfected "purchase money security interest" under the PPSA; and
- (ii) not to allow any third party to acquire a security interest in the goods.

(c) To the extent that the goods are for the Customer's business use, the Customer agrees to the extent permitted under the PPSA, that the Customer has no right:

- (i) to receive notice of removal of an accession under the PPSA;
- (ii) under Chapter 4 of the PPSA; or
- (iii) under the PPSA to receive a copy of any verification statement of financing change statement under the PPSA.

(d) Without in any way limiting clause 36(c), the Customer agrees that to the extent permitted under the PPSA, the Customer hereby waives its rights under sections 95, 96, 117, 118, 120, 121(4), 123, 125, 126, 128, 129, 130, 132, 134, 135, 142 and 143 of the PPSA.

(e) Unless otherwise agreed to in writing by Kelair, the Customer waives its right to receive a verification statement in accordance with section 157 of the PPSA.

(f) The Customer hereby waives its rights to receive notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA.

(g) The Customer must not assign or grant a security interest in respect of any accounts owed to it in relation to the goods without Kelair's prior written consent.

(h) Without limiting any other provision of these Terms, if the Customer makes a payment to Kelair at any time whether in connection with the supply of goods or otherwise, Kelair may, at its absolute discretion, apply that payment to first satisfy obligations that are not secured, then obligations that are secured, but not by a purchase money security interest, in the order in which those obligations were incurred, and then obligations that are secured by a purchase money security interest in the order in which those obligations were incurred.

(i) Everything the Customer is required to do under this clause 36 is at the Customer's expense. The Customer agrees to pay or reimburse Kelair's costs and expenses in connection with anything Kelair does under this clause 36.

37. Pallets:

Where requested by Kelair, the Customer will return pallets and any re-useable packaging provided with goods. The Customer indemnifies Kelair for the full replacement cost thereof, if not returned to Kelair promptly and in good order following Kelair's request.

38. Exclusion of warranty:

To the extent permissible at law (including under the Australian Consumer Law), Kelair is not bound by any warranty (and the Customer agrees not to make any claim against Kelair in relation to any warranty) in respect of goods or services unless all goods and services have paid for in full without set-off or deduction of any kind.

39. The Competition and Consumer Act 2010 (Cth) and Fair Trading Acts:

(a) Nothing in these Terms is intended to have the effect of contracting out of any applicable provisions of the *Competition and Consumer Act 2010 (Cth)* or the Fair Trading Acts in each of the States and Territories of Australia, except to the extent permitted by those Acts where applicable.

(b) If the Customer is a consumer for the purposes of the Australian Consumer Law, nothing in these Terms limits any remedy available for a failure of the guarantees in sections 56 and 57 of the Australian Consumer Law.

40. Limitation of Liability:

(a) This clause 40 is subject to any contrary provisions of any applicable law (including without limitation the Australian Consumer Law), the operation of which cannot be excluded.

(b) Except as provided in subclause 40(c), Kelair's liability for a breach of these Terms, a condition, warranty or a guarantee of supply or in relation to defective goods or services is limited to (at Kelair's election):

- (i) in the case of goods Kelair supplies:

- A. the replacement of the goods or the supply of equivalent goods;
- B. the repair of the goods; or
- C. the payment of the cost of replacing the goods or of acquiring equivalent goods;
- (ii) in the case of services Kelair supplies, the supplying of the services again, and the Customer will limit any claim upon Kelair accordingly.
- (c) If goods or services Kelair supplies are of a kind ordinarily acquired for personal, domestic or household use or consumption, and there is a “major” failure of the goods or services to meet any consumer guarantee under the Australian Consumer Law then the Customer may choose one of the following remedies:
 - (i) in the case of goods Kelair supplies:
 - A. ask for a refund;
 - B. return the goods and ask for an identical replacement, or one of similar value if reasonably available; or
 - C. keep the goods and ask for compensation for the drop in value caused by the problem; or
 - (ii) in the case of services Kelair supplies:
 - A. cancel the contract and pay a reasonable amount for the work done, or seek a refund; or
 - B. for money already paid, keep the contract and negotiate a reduced price for the drop in value of the service — this may mean asking for some of the money back the Customer has already paid.

41. General Indemnity:

- (a) The Customer shall comply with all instructions of Kelair in relation to the handling, fitting and installation and use of goods supplied by Kelair.
- (b) The Customer shall to the extent permissible at law including under the Australian Consumer Law, keep Kelair indemnified against all costs, claims, demand expenses and liabilities of whatsoever nature, including without prejudice to the generality of the foregoing, claims for death, personal injury, damage to property and consequential loss (including loss of profits) which may be made against Kelair, or which Kelair may sustain, pay or incur, as a result of:
 - (i) the Customer’s failure to comply with clause 41(a); or
 - (ii) the Customer’s acts, omissions, negligence or wilful misconduct.

42. Tooling:

The Customer agrees that all tooling, material or intellectual property employed in the preparation for or production of goods, products or provision of any services will be and remain the property of Kelair notwithstanding any contribution by the Customer thereto.

43. Building and General

The rights, powers and remedies available to Kelair under these Terms are in addition to and are not in derogation of Kelair’s powers, rights and remedies existing at common law, or given by any law at any time in force (including but not limited to the *Building and Construction Industry Security of Payment Act 2002* (Vic)).