

# Terms of Trade (“Terms”)

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## 1 Application of Terms

- 1.1 These Terms govern our supply of Equipment and Services to you, including supplies on a cash basis.
- 1.2 If you wish to negotiate these Terms with us then you should respond to this document, marking up these Terms and drawing those changes to our attention and obtain our agreement in writing.
- 1.3 It is not our practice to otherwise review terms and conditions on documents that you issue to us.
- 1.4 Unless we otherwise agree in writing, we do not accept, and will not be bound by, any terms or conditions included in, attached to, or referenced in, any other document you give to us like a purchase order.

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## 2 Quotations and our Schedule of Rates

- 2.1 Each quotation that we issue:
  - (a) is an estimate only;
  - (b) is not an offer or obligation to hire any Equipment to you or to perform any Services;
  - (c) is exclusive of GST;
  - (d) remains valid for acceptance for a period of thirty (30) days from the date of quotation, unless withdrawn by us before a contract for supply is formed; andunless the quotation states otherwise.
- 2.2 A quotation/Schedule of Rates may include additional terms or conditions, which will supplement these Terms.

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## 3 Formation of contract

- 3.1 We are not obliged to hire any Equipment to you or perform any Services until after a contract for supply is formed.
- 3.2 A contract for supply is formed, and you have accepted these Terms, when:
  - (a) you place an Order with us (whether you have signed our Schedule of Rates or not); and
  - (b) we have received any deposit we have required from you in respect of the Order before progressing it; andeither we have:
  - (c) accepted your Order in writing; or
  - (d) hired any Equipment to you or performed any Services following receipt of your Order.
- 3.3 If you revoke an Order:
  - (a) prior to the formation of a contract for supply then:
    - (i) we will refund you any deposit you have paid in respect of that Order; and
    - (ii) you will not be required to pay any fee for the cancellation of the Order; or alternatively
  - (b) after the formation of a contract for supply then unless we are in breach of the contract for supply:
    - (i) you must pay all our reasonable costs associated with fulfilment of your Order; and
    - (ii) we may apply any deposit you have paid towards those costs.

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## 4 Price

- 4.1 The price payable for the Equipment or Services will be:
  - (a) the price agreed in writing; or alternatively
  - (b) the price by our prevailing price list/rates as when you place your Order, as set out in our quotation or Schedule of Rates.
- 4.2 We may vary our price or rates by notice to you if you request:
  - (a) different Equipment or Services to be supplied to the contract for supply; or
  - (b) that we delay the hire of Equipment or performance of the Services for sixty (60) days or more.
- 4.3 Where we vary the price or rates payable for the Equipment or Services pursuant to subclause 4.2, we will notify you of the new price/rates. Thereafter you may reject the new price/rates within seven (7) days and terminate the contract for supply without any cost or penalty to you, otherwise you agree that the price/rates will apply to the contract.

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## 5 Additional charges

- 5.1 Subject to subclause 5.2, you acknowledge and agree:
  - (a) a daily hire rate applies to the Dry Hire of Equipment (whether or not the Equipment is hired for a full day); and
  - (b) our daily minimum charge rate for the performance of Services is four (4) hours, after which rates will be charged in fifteen (15) minute blocks (except for the in the case of TMAs, in which case the minimum charge rate for the performance of Services is six (6) hours, after which rates will be charged in thirty (30) minutes blocks)).
- 5.2 Unless our quotation or Schedule of Rates states otherwise, our rates:
  - (a) do not account for travel costs to and from country Victorian areas (i.e. areas located fifty (50) or more kilometres from our business premises);
  - (b) do not account for road tolls we incur during performance of the Services (where the Services are performed in or around a toll zone); and
  - (c) in relation to our Personnel, do not account for:
    - (i) overtime;
    - (ii) penalty rates (including where our Personnel are required to work during inclement weather (e.g. rain or extreme heat (35°C and above), in which case double time rates will apply); or
    - (iii) allowances (including travelling, meal, site and living away allowances),the costs of which will be payable by you as additional charges.

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## 6 Supply of Services

- 6.1 Prior to the commencement of the Services, you must:
  - (a) ensure you have in place all permits and approvals required for us to perform the Services (failing which, we will obtain all such permits and approvals at your expense);
  - (b) provide us with such information and documentation that we determine may reasonably be required to perform the Services; and
  - (c) inform us of any special requirements pertaining to your Order (such as site-specific information).
- 6.2 You must at all reasonable times during the performance of the Services permit our Personnel to have free, clear, and unrestricted access to the site where the Services are to be performed to enable us to fulfil our obligations without unreasonable interruption, impediment, delay, or obstruction.

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## 7 Payment terms

- 7.1 Unless you have a Credit Facility with us which is not in default:
  - (a) deposits we have requested must be paid before we hire any Equipment to you or commence performance of the Services;
  - (b) the applicable hire rate and any other charges for all Equipment hired on a Dry Hire basis must be paid for in advance of you taking possession of the Equipment; and
  - (c) you must pay for all Services on a progressive hourly basis as performed.
- 7.2 Payment may be made by cash, cheque, electronic funds transfer, Visa, or Mastercard credit cards. We reserve the right to change the payment methods that we accept at any time.
- 7.3 We may charge a payment surcharge for applicable payment transactions equal to our reasonable cost of acceptance.
- 7.4 You agree to pay GST on all taxable supplies upon us issuing you a tax invoice relating to the taxable supply.
- 7.5 You agree to pay sums due to us free of any set off or counterclaim and without deduction or withholding.

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## 8 Dry Hire of Equipment

- 8.1 This clause 8 applies to the Dry Hire of Equipment.
- 8.2 The hire period will commence, and risk of loss, damage, or deterioration to the Equipment passes to you, at the time:
- (a) (where you collect the Equipment):
    - (i) you or any third party on your behalf collects the Equipment from the point of hire; or
    - (ii) your nominated carrier takes possession of the Equipment; or
  - (a) (where we deliver the Equipment) we or our nominated carrier delivers the Equipment to the agreed place for delivery.
- 8.3 In consideration of us hiring the Equipment to you, you agree to pay us:
- (a) the agreed hire rate;
  - (b) all other charges, levies, and fees set out in our quotation or Schedule of Rates;
  - (c) cleaning costs (if the Equipment is returned to us in an unclean state);
  - (d) charges at our then prevailing rates where you require induction or training in relation to the operation of the Equipment; and
  - (e) any tolls, levies, fines, or penalties we incur arising out of or in connection with your use or operation of the Equipment.
- 8.4 Risk in the Equipment remains with you until such time as:
- (a) you return the Equipment to us or our nominated carrier; or
  - (b) we repossess the Equipment,  
**(Risk Period).**
- 8.5 You are strictly liable for any damage, loss, or theft to the Equipment that occurs during the Risk Period.
- 8.6 If the Equipment breaks down, is damaged, or otherwise becomes inoperable (for whatever reason, including due to it being deemed unsafe to operate), you must promptly:
- (a) notify us by telephone and in writing; and
  - (b) take all reasonable steps to secure and safeguard the Equipment from any potential damage or injury to any person or property (including further damage to the Equipment).
- 8.7 Upon receipt of your notice under subclause 8.6(a):
- (a) the hire rate will be suspended until such time as the Equipment is repaired or we have provided you with a suitable replacement (unless you or your Personnel have caused the damage, in which case the hire rate will continue to apply); and
  - (b) we will take all reasonable steps to repair the Equipment or provide you with a suitable replacement as soon as reasonably practicable.
- 8.8 If the Equipment breaks down, is damaged, needs to be recovered, or otherwise becomes inoperable due to any act or omission of yours, your Personnel, or any third party, you agree to:
- (a) pay us any costs we incur to repair or recover the Equipment (as the case may be); and
  - (b) continue to pay us the hire rate during the period in which we are recovering or repairing the Equipment or procuring a suitable replacement.
- 8.9 If the Equipment is unable to be returned to us (for example, if it is lost, stolen, or damaged beyond economic repair) then you must pay us the aggregate of the following:
- (a) all money past due but not yet paid under the hire contract;
  - (b) any salvage costs we incur in salvaging the Equipment; and
  - (c) the replacement cost of the Equipment (calculated in accordance with then prevailing market value of the Equipment).
- 8.10 If the Equipment is stolen during the Risk Period, you must promptly (and in any event within three (3) Business Days of the date the Equipment was stolen) provide us with a copy of a police report explaining the circumstances of the theft.
- 8.11 Unless the hire contract provides for a minimum period of hire, you may terminate a hire contract by:
- (a) returning the Equipment to us at the point of hire (during Business Hours); or

- (b) notifying us the Equipment is ready for collection (in which case you must obtain from us an 'Off-Hire Number', failing which you will not be deemed to have notified us the Equipment is ready for collection).
- 8.12 Where you notify us the Equipment is ready for collection pursuant to subclause 8.11(b), you must do so (during Business Hours) at least the day before the day the Equipment is to be off-hired, failing which we may charge you the hire rate for that day.
- 8.13 You must return the Equipment to us in the same state of cleanliness and in substantially similar condition (subject to fair wear and tear) that the Equipment was in when you took possession of it.
- 8.14 If:
- (a) the hire contract expires or is terminated; and
  - (b) you fail to return the Equipment to us at the point of hire or notify us the Equipment is ready for collection within a reasonable time,
- then you:
- (c) permit us to enter upon any premises you occupy (or any premises any receiver, receiver and manager, administrator, liquidator, or trustee in bankruptcy of yours occupies) as your invitee to repossess the Equipment; and
  - (d) authorise us to disconnect, dismantle, and remove the Equipment.

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## 9 Property and title in the Equipment

- 9.1 You acknowledge and agree that we are the owner of the Equipment and retain title to the Equipment in all circumstances. Where you hire the Equipment on a Dry Hire basis, your right under the hire contract to possess the Equipment is as a bailee only.
- 9.2 For the removal of doubt, neither payment of compensation nor any other event or circumstances will amount to, constitute, or result in any transfer of property or interest in the Equipment from us.

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## 10 Security interest

- 10.1 Unless you have obtained our prior written and fully informed consent, you undertake not to:
- (a) register a financing change statement in respect of a security interest in our favour; or
  - (b) create, or purport to create, any security interest in the Equipment, nor register, nor permit to be registered, a financing statement or financing change statement in relation to the Equipment in favour of any third party.
- 10.2 You:
- (a) waive your right to receive a copy of any verification statement in accordance with section 157 of the PPS Act; and
  - (b) agree that, to the extent permitted by the PPS Act:
    - (i) sections 95, 96, 117, 118, 120, 121(4), 123, 125, 126, 128, 129, 130, 132, 134, 135, 142, and 143 of the PPS Act do not apply and are hereby contracted out of; and
    - (ii) you waive your right to receive notices under sections 95, 118, 121(4), 127, 130, 132(3)(d), and 132(4) of the PPS Act.
- 10.3 We need not disclose information of the kind detailed in section 275(1) of the PPS Act, unless required by law.
- 10.4 Where we have rights in addition to those under Part 4 of the PPS Act, those rights continue to apply.

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## 11 Default

- 11.1 Subclauses 11.2 to 11.4 apply if you fail to pay sums to us when they fall due.
- 11.2 We may charge you interest on the outstanding debt (including any judgment debt) at the rate of 10% per annum.
- 11.3 We may suspend or cease the supply of any further Equipment or Services to you.
- 11.4 We may require pre-payment in full for any Services which have not yet been performed.

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## 12 Indemnity

- 12.1 If you default in the performance or observance of your obligations under any contract of which these Terms form part, then:
- (a) we will take steps to mitigate our loss and act reasonably in relation to any default by you; and
  - (b) we will give you notice requesting payment for loss and damage occasioned in respect of those events and requesting that you remedy any breach within a reasonable time; and
  - (c) if that demand is not met then you indemnify us in respect of loss, damage, costs (including collection costs, bank dishonour fees, and legal costs on an indemnity basis) that we have suffered arising therefrom.
- 12.2 Your liability to indemnify us will be reduced proportionally to the extent that any fraud, negligence, or wilful misconduct by us or a breach of our obligations under contract has contributed to the Claim, loss, damage, or cost which is the subject of the indemnity.
- 12.3 Your liability to indemnify us is a continuing obligation separate and independent from your other obligations and survives the termination or performance of any contract of which these Terms form part.

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## 13 Limitation of liability

- 13.1 No party is liable to the other party for any Consequential Loss, including under clause 12, however caused arising out of or in connection with any contract of which these Terms form part.
- 13.2 While we will take reasonable endeavours to meet any estimated delivery date or estimated time for Equipment and Services, you acknowledge and agree that we are not liable for any delay associated with meeting those estimated timeframes.
- 13.3 If the contract is not a Consumer Contract or a Small Business Contract then, to the extent permitted by law, our liability is limited to:
- (a) (in the case of the Dry Hire of Equipment):
    - (i) us repairing the Equipment or providing a suitable replacement; or
    - (ii) us paying you the cost of having the Equipment repaired or procuring a suitable replacement.
  - (b) (in the case of a supply of Services):
    - (i) us supplying the Services again; or
    - (ii) us paying you the cost of having equivalent Services supplied.

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## 14 Termination

A party may, with immediate effect, terminate any contract of which these Terms form part by notice in writing, if the other party:

- (a) commits a material or persistent breach of these Terms and does not remedy that breach (if capable of remedy) within seven (7) days of the receipt of a notice (or such longer time as specified in the notice) identifying the breach and requiring its remedy; or
- (b) has failed to pay sums due to the party within seven (7) days; or
- (c) has indicated that it is, or may become, insolvent; or
- (d) ceases to carry on business; or
- (e) comprises an entity which is the subject of the appointment of receivers or managers; or
- (f) comprises a natural person who:
  - (i) has committed an act of bankruptcy; or
  - (ii) has been made bankrupt;
- (g) comprises a corporation which:
  - (i) enters into voluntary administration;
  - (ii) is subject to a deed of company arrangement; or
  - (iii) is subject to the appointment of liquidators or provisional liquidators.

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## 15 Variation

We may amend these Terms in the future by notifying you in writing. The amended Terms will thereafter apply to each Order you place unless you earlier give us written notice in advance of placing a further Order.

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## 16 Assignment

A party may only assign its rights under the contract for supply with the written consent of the other party.

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## 17 Subcontracting

You acknowledge that we reserve the right to subcontract:

- (a) the supply of any part of the Equipment to be hired; and
- (b) the Services to be performed (or any part of those Services),

however, any subcontracting will not relieve us of any of our obligations to you.

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## 18 Conflicts and Inconsistencies

If there is any conflict or inconsistency between any of the documents which together govern the relationship between the parties, it is agreed the order of precedence will be (highest to lowest):

- (a) any additional terms or conditions contained in our quotation or Schedule of Rates applicable to the hire of Equipment or the performance of Services;
- (b) any terms governing your Credit Facility; and
- (c) these Terms.

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## 19 Severance

If any part or term of our agreement with you (including any Credit Facility) is illegal, invalid, or unenforceable, it will be read down so far as necessary to give it a valid and enforceable operation or, if that is not possible, it will be severed from the contract and the remaining provisions will not be affected, prejudiced, or impaired by such severance.

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## 20 Governing law and jurisdiction

- 20.1 Our relationship is governed by and must be construed according to the law applying in the State of Victoria.
- 20.2 The parties irrevocably submit to the non-exclusive jurisdiction of the courts of the State of Victoria with respect to any proceedings that may be brought at any time relating to our relationship.

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## 21 Definitions

In these Terms, unless the context otherwise requires, the following apply.

- 21.1 **Australian Consumer Law** means Schedule 2 to the *Competition and Consumer Act 2010* (Cth), as amended.
- 21.2 **Business Hours** means between 09:00am to 5:00pm on a day that is not a Saturday, Sunday, or gazetted public holiday in the place where the Equipment or Services are, or are to be, supplied.
- 21.3 **Claim** includes a claim, notice, demand, action, proceeding, litigation, investigation, judgment, or award howsoever arising, whether present, unascertained, immediate, future, or contingent, whether based in contract, tort, pursuant to statute or otherwise and whether involving a third party or a party to a contract for supply.
- 21.4 **Consequential Loss** includes any:
  - (a) consequential loss;
  - (b) loss of anticipated or actual profits or revenue;
  - (c) loss of production or use;
  - (d) financial or holding costs;
  - (e) loss or failure to realise any anticipated savings;
  - (f) loss or denial of business or commercial opportunity;
  - (g) loss of or damage to goodwill, business reputation, future reputation, or publicity;
  - (h) loss or corruption of data;
  - (i) downtime costs or wasted overheads; or
  - (j) special, punitive, or exemplary damages.

- 21.5 **Consumer Contract** has the meaning given to this term in section 23(3) of the Australian Consumer Law.
- 21.6 **Credit Facility** means an account we have opened for you on which we may, from time to time, extend you with additional time to pay for our Equipment and Services and associated charges.
- 21.7 **Dry Hire** means the hire of Equipment under your exclusive direction and control.
- 21.8 **Equipment** means the vehicles, plant, machinery, flashing arrow boards, VMS boards, signs, pedestrian barriers, chains, traffic cones, tape, bollards, and/or other items hired by you or used by us in performance of the Services (as the context requires), as described on our quotation, invoice, or any other form issued by us.
- 21.9 **Order** means a written or oral order placed by you requesting that we supply you with Equipment or Services.
- 21.10 **Personnel** means officers, employees, and agents engaged by each Party (but does not include the other Party) and, in the case of the Supplier, includes its subcontractors (and any employee of those subcontractors).
- 21.11 **PPS Act** means the *Personal Property Securities Act 2009* (Cth), as amended.
- 21.12 **Services** means all services performed by us, including traffic and pedestrian control and management services, as described on our quotation, invoice, or any other form issued by us.
- 21.13 **Schedule of Rates** means the document we provide you entitled 'Schedule of Rates' (or similar) which sets out our price/rates for the hire of Equipment and the performance of Services, as amended from time to time.
- 21.14 **Small Business Contract** has the meaning given to this term in section 23(4) of the Australian Consumer Law.
- 21.15 **Supplier, we, us** means Metro Utility Traffic Services Pty Ltd ACN 145 262 308 as Trustee for Metro Utility Traffic Services Unit Trust ABN 37 199 741 515.

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## 22 Interpretation

In these Terms, unless the context otherwise requires:

- 22.1 A time is a reference to the time zone of Melbourne, Australia unless otherwise specified.
- 22.2 \$, dollar, or AUD is a reference to the lawful currency of Australia;
- 22.3 A party includes a reference to that person's executors, administrators, successors, substitutes (including a person who becomes a party by novation), assigns, and in the case of a trustee, includes any substituted or additional trustee.
- 22.4 A right includes a benefit, remedy, authority, discretion, or power.
- 22.5 The singular includes the plural and vice versa, and a gender includes other genders.
- 22.6 "In writing" or "written" means any expression of information in words, numbers, or other symbols, which can be read, reproduced, and later communicated, and includes electronically transmitted and stored information.
- 22.7 If a word or phrase is given a defined meaning, its other grammatical forms have a corresponding meaning.
- 22.8 Words such as "includes", "including", and "for example" are not words of limitation and are to be construed as though followed by the words "without limitation".
- 22.9 A term of an agreement in favour of two or more persons is for the benefit of them jointly and each of them separately.