

TXMONITOR TERMS AND CONDITIONS

1. DEFINITIONS AND INTERPRETATION

1.1 In these Terms and Conditions, unless the context otherwise necessarily requires:

“**Buyer**” means any person, firm or corporation including their successors, administrators and assigns, who, or which has requested the supply of Goods or Services by the Seller;

“**Goods**” means any goods available for sale to the Buyer by the Seller;

“**GST**” means goods and services tax under A New Tax System (Goods and Services Tax) Act 1999 (Cth);

“**Job site**” means a place for delivery of goods or performance of services other than the Seller's premises;

“**Price**” means the quoted price or the Seller's ruling price at the time of placement of an order for the supply of Goods and/or Services, and may be a lump sum amount or an amount to be calculated by reference to all labour necessary to provide the Services and the supply of specialised tools necessary to perform the Services but excludes all accommodation and cost of travel (other than local travel) to and from the job site;

“**POD**” means the probability of detection in relation to Services whereby the Seller tests machinery at the level of use by the Buyer, and the Seller's tests method or technique (examined against the manufacturer's specifications for use of the machinery) will detect the statistical probability of the machinery failing if maintained at the level of use by the Buyer;

“**Quotation**” means a written quotation of the Goods and/or Services provided by the Seller to the Buyer at the Buyer's request;

“**Reports**” means all documents created by the Seller or its agents, subcontractors, consultants and employees in relation to its performance of the Services;

“**Seller**” means Tx Monitor Pty Ltd ACN 162 766 770 and its assignees;

“**Services**” means inspection, testing, audit, engineering services, risk management and repair management services supplied by the Seller to the Buyer;

“**Terms and Conditions**” means these terms and conditions.

1.2 Words importing the singular include the plural and vice versa unless the context otherwise requires.

1.3 A reference to any gender includes all genders unless the context otherwise requires.

1.4 Clause headings are for convenience of reference only and shall not affect the construction of the Terms and Conditions.

1.5 No course of prior dealings between the parties and no usage of trade are to be relevant to supplement or explain any term used herein.

2. ACCEPTANCE AND FORMATION OF CONTRACT

2.1 Subject to sub-clause 2.3, a contract will be deemed to have been created upon receipt by the Seller of an oral or written order from the Buyer for the supply of Goods and/or Services and acceptance of that order by the Seller either by:

(a) written notice of acceptance to the Buyer; or

(b) delivery of Goods to the Buyer or performance of Services by the Seller.

2.2 All sales are limited to and expressly made conditional on the Buyer's assent to these Terms and Conditions. In the event the Buyer accepts any Goods or Services, such performance by the Buyer shall be deemed to be upon these Terms and Conditions. Any Goods or Services the Seller sells or provides will be deemed accepted by the Buyer upon delivery, in the case of Goods, or performance, in the case of Services. These Terms and Conditions shall apply to the exclusion of all and any other terms or conditions which are implied by trade, practice or course of dealing.

2.3 Terms and conditions on the Buyer's order form or elsewhere, at variance with these Terms and Conditions, are binding upon the Seller only if specifically accepted by a duly authorised representative of the Seller in writing.

2.4 The Seller may, in its absolute discretion, refuse to supply Goods and/or Services.

2.5 The Buyer cannot cancel a contract for the supply of Goods and/or Services unless agreed to in writing by the Seller and on terms that will indemnify the Seller against loss.

3. REPORTS

3.1 The analysis for the machinery identified in a Report and the risk rankings and associated maintenance implications is based on the following:

(a) the manner in which the machinery was installed;

(b) the environment in which the machinery is installed;

(c) the level of use of the machinery by the Buyer since the Buyer began using the machinery;

(d) the manner in which the machinery is being used by the Buyer;

(e) comparing the use of the machinery by the Buyer against the manufacturer's recommended use;

(f) the future use of the machinery by the Buyer; and

(g) our years of experience in monitoring and servicing machinery of this nature.

3.2 The Seller will not be under any liability to the Buyer in respect of any loss or damage (including consequential loss or damage) which may arise directly or indirectly from:

(a) the Buyer drawing conclusions from Reports or certification Reports beyond the scope of any test, investigation or inspection undertaken as part of the Services;

(b) any expectation by the Buyer or any third party that any tests carried out as part of the Services will have a higher POD to that generally accepted in accordance with good industry practice, having regard to the variability in discontinuity, form, size, orientation or texture and the limitations of relevant test methods used in providing the Services; and

(c) any expectation by the Buyer that measurements referred to in a Report or certification Report will have an uncertainty less than that referred to in any relevant standard.

3.3 The Report is prepared only for the benefit of the Buyer and may not be relied upon by any third party.

4. PRICE AND PAYMENT

4.1 All Goods and Services are sold at the Price.

4.2 In addition to any accommodation and travel costs, unless otherwise expressly stated the price is subject to adjustment by the Seller for increases in the cost of materials or labour occurring after the date of the contract, freight and cartage, foreign exchange fluctuations, changes in duties or taxes, the imposition of a GST or other tax, surcharge or levy, stamp duty, storage charges, demurrage costs, delivery costs, legal costs (solicitor and own client costs) and disbursements if incurred by the Seller in relation to breach of contract by the Buyer, costs or charges incurred by the Seller with respect to the recovery from or return of Goods by the Buyer, or any other costs not included in the price and occurring for reasons beyond the reasonable control of the Seller.

4.3 Except as otherwise agreed in writing, the Buyer shall pay the price to the Seller for Goods and Services within thirty (30) days from the date of Seller's invoice.

4.4 Where the contract involves the procurement of Goods and provision of initial Service's prior to performance of contract then the following payment terms will apply:

- (a) 30% of contract price at placement of order;
- (b) 50% at procurement of Goods. The supply of delivery dockets will be sufficient evidence to establish the meeting of this milestone;
- (c) 20% at completion of contract.

4.5 Where the Seller agrees to extend credit to the Buyer:

(a) the full amount of each invoice for Goods and Services supplied by the Seller together with any additional charges will be paid by the Buyer to the Seller no later than thirty (30) days from the expiration of the month in which the Goods are delivered or the Services performed;

(b) the Buyer will ensure that the total amount outstanding from time to time is within the credit limit determined by the Seller.

4.6 The Buyer shall pay the Seller, on demand, default interest at the rate of 1.5% per month on all overdue amounts owed by the Buyer to the Seller. Interest shall be calculated daily and payable together with the overdue amount.

4.7 All invoiced amounts must be paid by the Buyer in full and without deduction of any kind.

5. CHANGES TO ORDER

Where any variation of contract is requested by the Buyer, the Buyer shall pay to the Seller any costs and expenses incurred by the Seller relating to the variation. The Seller shall not be responsible for delays in delivery or performance due to such variation.

6. DELIVERY

6.1 Goods shall be delivered and Services performed by the Seller as soon as reasonably practicable after the date of contract unless otherwise specified in the contract. Quoted delivery or service times shall not be binding unless incorporated in the contract.

6.2 The Goods will be deemed to be delivered once they arrive at the job site. The Goods will be delivered to the job site by either:

- (a) courier to ensure the Goods are at the job site prior to the Seller commencing the Services;
- (b) by the Seller's employees at the time they are scheduled to commence performing the Services at the job site; or
- (c) directly to the job site at which the Services are being performed by the Seller.

6.3 The Buyer ensures that the Seller and its employees, agents and contractors have reasonable access to the job site for the Services being performed and/or the Goods being delivered.

6.4 If the Goods are delivered by way of courier or other means directly to the job site, then the unloading of Goods at the job site shall be the responsibility of the Buyer and at the Buyer's costs. The Seller reserves the right to unload the Goods at the Buyer's cost if the Buyer is unable to do so promptly. The Seller shall not be responsible for any claims for damage, expense or cost resulting from any exercise of such right by the Seller.

6.5 Where the Seller or its agent is required to enter onto the Buyer's property for the purpose of delivery, the Buyer grants the Seller or its agent(s) access to enter the Buyer's property and releases the Seller from any liability for damage to the property of the Buyer.

6.6 A quantity, description, date, time and place of delivery of Goods or Services as indicated on the Seller's invoice or delivery docket shall be conclusive evidence of such quantity, description, date, time and piece of delivery.

6.7 Where delivery of Goods cannot be affected for reasons beyond the Seller's reasonable control, a delivery and return fee based on master carrier rates shall be paid by the Buyer as an additional cost of the Seller.

7. INSPECTION

7.1 The Buyer shall inspect Goods immediately upon delivery, and inspect all Services capable of inspection on completion of the relevant work.

7.2 No claim for shortages or damaged or defective Goods or Services may be made against the Seller unless written notice of such claim is received by the Seller within seven (7) days after delivery.

7.3 If the Buyer fails to advise the Seller of any faults or any failure of the Goods or Services to accord with the contract within seven (7) days after delivery of the Goods or completion of the relevant work, the Goods or Services shall be deemed to conform to the contract.

7.4 To the extent permitted by law, the Buyer shall hold the Seller harmless and keep the Seller indemnified from any claims, damages, expenses or costs resulting from or arising out of the use of the Goods by the Buyer or provision of Services to the Buyer.

8. RISK AND TITLE IN GOODS

8.1 Risk of loss or damages to all Goods shall pass to the Buyer immediately upon delivery. It shall be the Buyer's responsibility to arrange appropriate insurance at its cost.

8.2 Until the Seller has received payment in full and cleared payment of the purchase price, title in the Goods shall not pass to the Customer. Until the Seller has received full and cleared payment of the Goods the Buyer shall hold possession of the Goods as bailee only. In the event the Buyer has not paid the Seller in full for all Goods and on all invoices received, then the Buyer grants to the Seller a security interest pursuant to clause 9 of these Terms and Conditions. On the full payment of the purchase price by the Buyer, the Seller will release all security interest it holds over the Goods.

8.3 While the Buyer holds possession of the Goods as bailee, the Buyer:

- (a) is responsible for its proper care and maintenance;
- (b) is liable for any loss or damage occasioned to it; and
- (c) will indemnify the Seller against any claim arising from its use.

8.4 The Seller may terminate such bailment at any time by giving written notice to the Buyer.

8.5 Where the Seller is entitled to reclaim possession of the Goods, the Buyer authorises the Seller, its servants and agents to lawfully enter the Buyer's property for the purposes of retaking possession of the Goods.

8.6 Notwithstanding the above, where the Goods become part of other goods or are incorporated in any object, the Goods shall be deemed to remain separate and subject to the rights of the Seller until payment of all sums owing to the Seller.

8.7 Where Goods supplied by the Seller to the Buyer are replacement goods, property in the Goods which have been replaced will pass to the Seller upon replacement.

9. PERSONAL PROPERTY SECURITIES ACT

9.1 This clause will apply to any supply of Goods made on or after the registration commencement time (as defined in the Personal Properties Securities Act 2009) ("PPSA").

9.2 If possession of the Goods is transferred to the Buyer in the circumstances described in clause 8 of these Terms and Conditions and the Seller has not received full payment for the Goods, the Buyer grants to the Seller at the time the Buyer takes possession, a purchase money security interest ("PMSI") (pursuant to the PPSA) in the Goods and any proceeds from the Goods.

9.3 The Seller will register a financing statement under the PPSA for its PMSI and the Buyer agrees to execute any documents, provide all necessary information and do anything else required to ensure the Seller obtains and maintains a perfected security interest as that term is defined by the PPSA, which will have priority over all other security interests in the Goods.

9.4 The Buyer agrees to pay all costs and expenses incurred by the Seller in connection with the registration of the Seller's security interest and any enforcement or attempted enforcement and removal of that interest, or preservation of any right or interest under these Terms and Conditions or otherwise conferred on the Seller by the PPSA.

9.5 To the extent permitted under the PPSA, the Buyer agrees that nothing in sections 142 or 143 of the PPSA will apply to these Terms and Conditions or the security interest granted by the Buyer to the Seller, the Buyer agrees to waive their rights to any of the following provided for in the PPSA:

- (a) receive notice of removal of an accession under section 95;
- (b) receive notice of an intention to seize collateral under section 123;
- (c) receive notice of disposal of collateral under section 130;
- (d) receive information under a statement of account under section 132(3)(d);
- (e) receive a statement of account if there is no disposal under section 132(4);
- (f) receive a notice of retention of collateral under section 135;
- (g) receive a notice of verification statement under section 157.

10. LIMITATION OF LIABILITY

For the purpose of this clause,

"**Non PDH Goods**" means any Goods which are not PDH Goods;

"**Non PDH Services**" means any Services which are not PDH services;

"**PDH Goods**" means any Goods which, for the purposes of section 3(1) of the Australian Consumer Law, are goods of a kind ordinarily acquired for personal, domestic or household use or consumption; and

"**PDH Services**" means any services which, for the purposes of section 3(1) of the Australian Consumer Law, are services of a kind ordinarily acquired for personal, domestic or household use or consumption.

10.1 If the Seller:

- (a) in supplying the Goods to the Buyer is supplying goods to a consumer; or
 - (b) in providing the Services to the Buyer is supplying services to a consumer,
- those Goods and Services come with guarantees that cannot be excluded under the Australian Consumer Law.

10.2 The Seller acknowledges that if:

- (a) any Goods supplied to the Buyer are PDH Goods or Non PDH Goods, the purchase price for which is less than \$40,000 (or such amount specified or prescribed under section 3 of the Australian Consumer Law from time to time); or
 - (b) any Services provided to the Buyer are PDH Services or Non PDH Services, the purchase price for which is less than \$40,000 (or such other amount specified in or prescribed under section 3 of the Australian Consumer Law from time to time),
- then, subject to the provisions of the Australian Consumer Law (including, without limitation, section 3(2)), a number of the Consumer Guarantees may apply.

10.3 Nothing in this warranty should be interpreted as attempting to exclude, restrict or modify the application of any applicable provisions of the Australian Consumer Law or the Consumer's right to make a claim in respect of any Consumer Guarantees or under any other provision of the Australian Consumer Law.

10.4 If the Goods are Non PDH Goods or the Australian Consumer Law does not apply to the Buyer's purchase of the Goods, then (to the extent permitted by law) any claim relating to the Goods is limited, at the Seller's option, to:

- (a) the replacement of the Goods;
- (b) the supply of the equivalent Goods;
- (c) the repair of the Goods;
- (d) the payment of the cost of replacing the Goods or of acquiring equivalent Goods; or
- (e) the payment of the cost of having the Goods repaired.

10.5 If the Services are Non PDH Services or the Australian Consumer Law does not apply to the Buyer's purchase of the Services, then (to the extent permitted by law) any claim relating to the Services is limited, at the Seller's option, to:

- (a) the supply of the Services again; or
- (b) the payment of the cost of having the Services supplied again.

10.6 For the avoidance of doubt, the Seller excludes all other warranties and guarantees with regard to our Goods and Services including all guarantees and warranties under law except for the guarantees that cannot be excluded under the Australian Consumer Law (and any other law).

10.7 The limitations described in clauses 10.4 and 10.5 do not apply where the Buyer establishes that it is not fair or reasonable for the liability of the Seller to be limited this way. Under these circumstances, the Seller's liability is limited to the maximum amount that is recovered under the Seller's public liability, product liability or professional indemnity insurance policies.

10.8 The Seller will not, under any circumstances and to the extent permitted by law, be liable to the Buyer for any matter arising out of the performance of the Services in respect of any indirect, consequential or special loss including without limitation loss of profits or revenue, loss of business opportunity, loss of protection or loss of goodwill suffered by the Buyer whether arising under or in connection with or incidental to the agreement between the Seller and the Buyer, whether by way of indemnity, by statute, in tort or on any other basis in law or in equity.

10.9 The Buyer shall defend, indemnify and hold harmless the Seller and the Seller's personnel from and against any and all claims, losses, liabilities and reasonable costs and expenses (including reasonable legal fees) that are related to, caused in any way by or in connection with:

- (a) the negligence or wilful misconduct of the Buyer or the Buyer's personnel; or
- (b) a breach by the Buyer or the Buyer's personnel of the agreement between the Buyer and the Seller.

11. WORKPLACE HEALTH & SAFETY

11.1 The Buyer will ensure:

- (a) it complies with all applicable workplace health and safety legislation, and all applicable standards, codes and other guides relating to workplace health and safety, including taking all necessary measures to ensure the safety and security of working conditions, sites and installations during the performance of the Services and supplying the Goods; and
- (b) it notifies the Seller in advance of any known hazards or dangers, actual or potential, associated with any order or samples or testing including, for example, the presence or risk of radiation, toxic, noxious or explosive elements or materials, or environmental pollution or poisons.

11.2 The Seller warrants that all of its employees, agents and contractors involved in the performance of the Services and/or Goods will adhere to the Buyer's workplace health and safety policies and procedures as advised to the Seller from time to time. However, the Buyer indemnifies the Seller and its employees, agents and contractors from any death, personal injury or loss suffered (consequential and non-consequential) as a result of any breach of the Buyer's obligations under clause 11.1 or any negligent act by any of the Buyer's employees, agents or contractors.

11.3 The Buyer must immediately inform the Seller of any incident arising out of the performance of the Services or the performance of the Goods which is required to be notified to an authority under applicable workplace health and safety legislation.

12. DEFAULT

In the event that:

- (a) the Buyer breaches or is alleged to have breached any contract by reason of failure to pay any amount owing to the Seller or any other act or omission;
 - (b) the Buyer becomes or threatens to become or is in jeopardy of becoming subject to any insolvency administration; or
 - (c) the Buyer ceases or threatens to cease conduct of its business in the normal manner,
- the Seller may without prejudice to any other of its rights,
- (a) save where payment in full has been received by the Seller, refuse delivery of Goods;
 - (b) refuse performance of Services;
 - (c) repossess any goods delivered to the Buyer, the payment for which has not been received; or
 - (d) retain (where applicable) all monies paid on account of Goods or Services.

13. FORCE MAJEURE

13.1 A party ("Affected Party") is not liable for any delay or failure to perform an obligation (other than to pay money) under these Terms and Conditions caused by any event beyond the control of the Affected Party, including:

- (a) act of God;
- (b) war, terrorist attack, riot, insurrection, vandalism or sabotage;
- (c) strike, lockout, ban, limitation of work or other industrial disturbance;
- (d) power surge or failure or breakdown of plant, machinery or equipment;
- (e) shortage of labour, transportation, fuel, power, plant, machinery, equipment or materials; or
- (f) law, rule or regulation of any government or governmental agency and executive or administrative order or act of general or particular application.

13.2 The Affected Party must notify each other party as soon as practical of any anticipated delay or failure caused by an event referred to in clause 13.1 ("Event").

13.3 The performance of the Affected party's obligation is suspended for the period of delay caused by the event.

13.4 If:

- (a) performance of an obligation is prevented by an Event; or
- (b) a delay caused by the Event exceeds 3 days;

Any party may terminate the contract between the parties at the expiration of not less than 7 days' notice to the other parties.

14. GENERAL

14.1 These Terms and Conditions are to be governed by and construed in accordance with the laws of the State in which this contract is made but in the event of doubt shall be governed by and construed in accordance with the laws of the State of New South Wales.

14.2 Any Term or Condition being a whole clause or part of a clause which is invalid, unlawful, void or unenforceable and capable of severance without affecting any other term or condition in these Terms and Conditions, shall be severed.

14.3 It is agreed that there is no other contract in force between the Buyer and the Seller with respect to the subject matter hereof and no alteration shall be binding unless agreed to in writing by the Seller. Failure of the Seller to exercise any right of remedy hereunder shall not be deemed a waiver of such right, nor shall any lien or other right of the Seller be lost or impaired by laches. The Buyer acknowledges that it has not relied upon any promise, statement or representation by or on behalf of the Seller which is not set out in the contract, and waives any right of action which it might otherwise have in respect of such representation, its sole remedy being for breach of contract.

14.4 The Buyer agrees to accept variations that are reasonably required in order to complete the work but for which formal approval by you is not able to be obtained at the time the variation is required to be undertaken.

14.5 A person who is not a party to this agreement shall have no rights under or connection with it.

14.6 Any notice, invoice or document for the Buyer shall be deemed to be sufficiently served by:

- (a) post and if posted by ordinary pre-paid post addressed to the Buyer at the Buyer's last known address and shall be deemed to have been received by the Buyer on the second business day following the date on which it was posted; or
- (b) facsimile transmission and transmitted by facsimile during normal business hours on a business day such notice, invoice or document shall be deemed to have been given on the business day which next follows the day of transmission; or
- (c) electronic form (such as email) and transmitted during normal business hours on a business day such notice, invoice or document shall be deemed to be delivered when the sender receives confirmation on its server that the message has been transmitted.