

TERMS & CONDITIONS OF HIRE OF PLANT & EQUIPMENT (EXCLUDING DRY HIRE)

SECTION A GENERAL TERMS

1. DEFINITIONS AND INTERPRETATIONS

1.1 Unless otherwise required by the context or subject matter, the following definitions shall apply:

"Agreement" means this agreement incorporating these terms and conditions, any schedule to this agreement and includes any written variation to this agreement;

"Charges" means the charges payable to Owner for the provision of the Services as specified on the face of this Agreement, or as specified on the particular quote or contract for the provision of the Services;

"Customer" means the party specified as such on the face of this Agreement and includes any party claiming through, under or in trust for the Customer, and in the context of the payment of Charges or other expenses shall include any Third Party Payee;

"Customer's Covenants" means the covenants, agreements and obligations contained or implied in this Agreement or imposed by law to be observed and performed by the Customer;

"Dispute" means any dispute or issue arising between the Customer and Owner pursuant to which the Customer considers that they should not pay Owner or pursuant to which either the Customer or Owner considers they have a claim against the other party;

"Dry Hire" means the hire of plant and equipment by Owner to the Customer without Owner also providing an operator for that Plant and Equipment;

"Due Date for Payment" means, unless otherwise specified on the front of this Agreement, thirty (30) days from either the date of the invoice or the provision of the Services, as the case may be;

"Event of Default" means:

(a) any money payable under this Agreement is not paid on or before the Due Date for Payment;

(b) the Customer fails to observe and perform any of the Customer's Covenants, other than a failure to pay money, and such failure continues for more than 3 days after Owner has given the Customer notice requiring the Customer to remedy the breach

(c) Owner ascertains that any warranty, representation or statement made by the Customer under or in connection with this Agreement has been false in any material respect;

(d) the Customer, being an individual, commits an act of bankruptcy, is declared mentally ill or is convicted of a criminal offence or dies;

(e) a receiver, or an agent in possession for a mortgagee is appointed in respect of any property of the Customer;

(f) a mortgagee takes possession of any property of the Customer;

(g) any execution or similar process is made against the property of the Customer;

(h) an application is made, a resolution is passed or a meeting is convened for the purpose of considering a resolution for the Customer to be wound up unless the winding up is for the purpose of reconstruction or amalgamation;

(i) a compromise or arrangement is made between the Customer and its creditors;

(j) a resolution is passed, or a meeting is convened for the purpose of considering a resolution for the Customer to be placed under official management;

(k) the Customer admits in writing its inability to pay its debts;

(l) an application is made to a court for an order summoning a meeting of any class of creditors of the Customer;

(m) an application is made or notice given or other procedure commenced for the dissolution or cancellation of the registration of the Customer under the *Corporations Act* or any similar process; or

(n) an investigation is commenced under section 13 of the *Australian Securities Commission Act* to investigate the affairs of the Customer.

"Force Majeure" means:

(a) Act of God;

(b) outbreak of hostilities, riot, civil disturbance, acts of terrorism;

(c) the act of any government or authority (including refusal or revocation of any licence or consent) where the said act is not a result of some neglect or default on the part of the relevant party;

(d) fire, explosion, flood, fog or bad weather;

(e) power failure, failure of telecommunications lines, failure or breakdown of plant and equipment, machinery or vehicles;

(f) default of suppliers or independent contractors;

(g) theft or malicious damage;

(h) strike, lockout or industrial action of any kind; and

(i) any cause or circumstance whatsoever (except financial difficulties or lack of funds) beyond the reasonable control of the relevant party;

"Goods" shall include all wares, merchandise, plant, machinery and articles of every kind and description and further includes packages, crates, cases and the contents thereof of whatsoever kind for carriage by Owner;

"Insurance" includes any policy of insurance effected by the Customer under this Agreement;

"Operator" means the operator employed or contracted by Owner to operate Owner Plant and Equipment during the period of Wet Hire of that Plant and Equipment;

"Owner" means Freo Group Pty Ltd (ACN 009 325 124) of Jakovich Centre, 4 McGrath Road, Henderson, Western Australia and includes its employees, agents or any sub-contractors and their employees;

"Plant and Equipment" means the plant and equipment supplied under this Agreement and includes but is not limited to any item of plant, equipment, machinery or vehicle, and any tools, accessories, parts, items of equipment and devices affixed to or supplied with such plant, equipment, machinery or vehicle supplied to the Customer by Owner;

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"Rate" means 2% more than the rate which Owner's bank would charge Owner in respect of an unsecured overdraft for an amount not exceeding \$100,000.00;

"Services" means the provision by Owner to the Customer of the carriage of Goods, Wet Hire, Dry Hire, or the performance of Civil Works as the case may be;

"Site" means the site where the Customer requires the Goods to be delivered or where the Customer requires the Plant and Equipment to be used;

"Term" means the period for which the Customer has engaged Owner to provide the Services;

"Third Party Payee" shall mean a party other than the Customer, as specified on the face of this Agreement, who shall be invoiced for the Charges by Owner; and

"Wet Hire" means the hire of any Plant and Equipment together with an Operator for that Plant and Equipment.

- 1.2 Unless otherwise required by the context or subject matter, a reference to a party includes that party's executors, administrators, personal representatives, successors and assigns. If a party comprises 2 or more persons, a reference to a party includes the executors, administrators, personal representatives, successors and assigns of each of those persons.
- 1.3 If a party comprises 2 or more persons, the covenants and agreements bind and must be performed by each of them jointly and severally and may be enforced against any one or any 2 or more of them.
- 1.4 This Agreement is governed by, and to be interpreted in accordance with, the laws of Western Australia and where applicable the laws of the Commonwealth of Australia

2. PAYMENT OF CHARGES

- 2.1 The Customer or the Third Party Payee as the case may be shall pay to Owner the Charges without any right of set off or deduction and regardless of any Dispute on the Due Date for Payment plus interest at the Rate on any money due to be paid under this Agreement which remains unpaid calculated daily from the Due Date for Payment to the date of actual payment.
- 2.2 The Customer shall pay any sales, rental or other taxes, stamp duty, import duties, bonds or any other charges which may be levied upon this Agreement and/or the use or delivery of the Plant and Equipment.
- 2.3 Every special instruction to the effect that the Charges under this Agreement shall be paid by the Third Party Payee shall be deemed to include a stipulation that if the Third Party Payee does not pay the Charges within thirty (30) calendar days of the Due Date for Payment, then the Customer shall pay the said Charges to Owner.
- 2.4 Owner shall be entitled to charge an extra fee for all delays caused as a result of Owner obeying any instructions given by the Customer or the Customer not fulfilling the Customer's Covenants.
- 2.5 Requests for credit or an extension of time to pay the Charges will not be considered by Owner unless requested by the Customer or the Third Party Payee within the earlier of seven (7) calendar days from the date of invoice or the provision of the Services, as the case may be.
- 2.6 The Customer shall pay to Owner all costs incurred by Owner in enforcing payment of any amount due, including all fees payable by Owner to:
 - (i) Owner's employees for their time spent enforcing payment, such time to be charged per hour or part thereof at \$90.00 per hour;
 - (ii) a bank for cheque or direct debit dishonour fees;
 - (iii) any debt collecting agency appointed by Owner from time to time; and
 - (iv) any solicitor appointed by Owner from time to time on a full indemnity basis.
- 2.7 The Customer must pay to Owner on demand all money (including legal costs) which:
 - (i) Owner pays or is liable to pay to make good any failure by the Customer to comply with any obligation under this Agreement; and
 - (ii) all costs and expenses that Owner may incur in the enforcement or protection or attempted enforcement or protection of Owner's rights under this Agreement or in the Plant and Equipment, including money paid by Owner in releasing any lien or other encumbrance claimed on the Plant and Equipment and in dismantling and removing the Plant and Equipment from any premises.
- 2.8 Unless otherwise specified the Charges are exclusive of GST and the Customer must pay Owner an amount equal to the GST payable on any supply made by Owner.
- 2.9 A notice or demand given or made to any person under this Agreement must be in writing, may be served by delivering it to that person personally or addressing it to that person and leaving it or posting it by pre-paid or certified post to the address of that person appearing in this Agreement or any other address nominated by that person by notice to the person giving the notice, and will be deemed to be given or made in the case of personal delivery, when delivered, and in the case of service by leaving the notice at an address specified above, when left at that address, and in the case of service by post, on the second business day following the date of posting.

3. TERMINATION & EXECUTION

- 3.1 Owner may terminate this Agreement upon an Event of Default.
- 3.2 On the occurrence of an Event of Default, Owner may:
 - (i) immediately cease performance of the Services; and
 - (ii) take possession of the Goods or the Plant and Equipment with or without notice to the Customer and for this purpose the Customer authorises irrevocable access to enter the Site to remove the Plant and Equipment and the Customer indemnifies Owner in respect of any loss arising from any act done under or by virtue of this sub clause.
- 3.3 Upon termination of this Agreement following the occurrence of an Event of Default, the Customer must pay to Owner by way of liquidated damages, in addition to and without prejudice to any other right or remedy of Owner, an amount equal to the total of:

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- (i) the unpaid balance of the Charges for the Term which would have been payable until the expiration of the Term had the Agreement not been terminated;
 - (ii) Owner's costs and expenses incurred in repossessing and storing, insuring and registering the Plant and Equipment and in entering on and removing the Plant and Equipment from the Site or other premises on which the Plant and Equipment was situated, and making good any injury or damage caused to the Site or premises;
 - (iii) Owner's costs and expenses of repairs reasonably necessary to bring the Plant and Equipment to a saleable condition; and
 - (iv) the interest calculated in accordance with clause 2.1; and
 - (v) any extra fees and costs payable pursuant to clauses 2.4, 2.6 and 2.7.
- 3.4 The Customer shall not do any act or thing to impede the removal of the Plant and Equipment at the end of the period of hire or the earlier seizure of the Plant and Equipment by Owner pursuant to the terms of this Agreement.
- 3.5 Notwithstanding anything contained in this Agreement to the contrary, Owner reserves the right to recall the Equipment at any time and without notice to the Customer when in Owner's opinion the Plant and Equipment is endangered or imperilled by any reason or cause whatsoever. The Customer indemnifies Owner in respect of any loss arising from any act done under or by virtue of this subclause.
- 3.6 If any part of this Agreement is, or becomes void or unenforceable, that part is or will be, severed from this Agreement to the intent that all parts that are not, or do not become, void or unenforceable remain in full force and effect and are unaffected by that severance.
- (a) Failure to exercise or delay in exercising any right, power or privilege in this Agreement by a party does not operate as a waiver of that right, power or privilege.
 - (b) A single or partial exercise of any right, power or privilege does not preclude any other or further exercise of that right, power or privilege, or the exercise of any other right, power or privilege.
- 3.7 This Agreement is, where applicable, subject to the Trade Practises Act 1974 or any State fair trading act.

4. INDEMNITIES

- 4.1 The Customer agrees to INDEMNIFY AND KEEP INDEMNIFIED Owner against:
- (i) any loss, damage, injury or death to any person (including the Operator) caused as a result of the act, omission or negligence or otherwise of the Customer, the Customer's employees, servants and agents whilst Owner performs the Services at the Site;
 - (ii) any loss or damage of any kind whatsoever caused to the Customer, the Plant and Equipment or to the property or Goods of the Customer unless such loss or damage was caused by the sole negligence of Owner; and
 - (iii) notwithstanding article 4.1 (ii) above, any consequential loss or damage sustained by the Customer or any other person howsoever caused.
- 4.2 The Customer agrees to assist and co-operate with Owner in relation to Owner exercising any and all of its rights in respect to the Plant and Equipment, including without limitation Owner instituting, carrying on and enforcing, compromising or completing any legal proceedings which Owner thinks desirable to protect its rights in respect of the Plant and Equipment.

5. NO SOLICITATION

- 5.1 If, during the Term or within 6 months of the expiry of the Term, the Customer solicits, employs or engages the services of any Operator or employee of Owner ("the Worker"), the Customer shall pay to Owner a finder's fee in respect of the Worker.
- 5.2 For the purposes of clause 5.1, the finder's fee shall be 25% of the Worker's annual salary (not including superannuation), or if the Worker is not on a fixed salary, 25% of the total payments made by Owner to that Worker in the calendar year immediately preceding the employment or engagement of the Worker by the Customer.
- 5.3 If at any time a court or judicial or administrative body is of the opinion that a finder's fee of 25% is unreasonable or excessive or liable to be struck down, then there shall be substituted for 25% a percentage of one percentum less in decreasing arithmetical progression until the court our judicial or administrative body no longer considers the amount of the finder's fee excessive or unreasonable or liable to be struck down and such amended percentage shall be substituted as the amount of the finder's fee.

6. FORCE MAJEURE

- 6.1 If a party becomes unable wholly or in part by Force Majeure to carry out any of its duties or obligations under this Agreement:
- (a) that party must give to the other party prompt written notice of:
 - (i) detailed particulars of the Force Majeure;
 - (ii) so far as is known, the probable extent to which the party will be unable to perform or will be delayed in performing the duty or obligation;
 - (b) the relevant duty or obligation, so far as it is affected by the Force Majeure, will be suspended during the continuance of the Force Majeure; and
 - (c) the party will use all reasonable efforts to overcome or remove the Force Majeure as quickly as possible.

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(EXCLUDING DRY HIRE)****SECTION B CARRIAGE OF GOODS****7. CONDITIONS SPECIFIC TO CARRIAGE OF GOODS**

- 7.1 Owner is not a common carrier and all goods carried or transported by Owner are transported pursuant to the terms of this agreement and Owner reserves the right to refuse the carriage or transport of goods for any person, corporation or company and the carriage or transport of any class of goods at its sole discretion and without being bound to give any reason for such refusal.
- 7.2 The Customer shall:
- (i) specifically declare and fully describe in writing the nature of the Goods to be carried and in particular describing their weight, value, whether they are of a noxious, dangerous, hazardous or inflammable nature or capable of causing damage or injury to any other Goods, or to any persons or animals or to any store, vessel, vehicles, wagon, van, aircraft or other conveyance of any kind whatsoever in which they may be loaded, carried, packed or stored, or which are in a liquid or a partly liquid form, and Owner will rely on such information when arranging for the handling of the Goods; and
 - (ii) ensure that the Goods are packed in accordance with any requirements specified by Owner; and
 - (iii) not tender any Goods to be transported which are illegal or prohibited by any law or regulation to be transported; and
 - (iv) be responsible for all extra costs and risk incurred by Owner because of and in reliance of the information declared under clause 7.2(i) and the Customer shall INDEMNIFY AND KEEP INDEMNIFIED Owner against:
 - (A) any and all damages and loss suffered by Owner or any other person as a result of any error, omission, misstatement or misrepresentation made by the Customer in respect of the Goods or by any servant or agent of the Customer or as a result of the insufficient or improper labelling or addressing of the Goods;
 - (B) all losses suffered by and claims made against Owner resulting from loss of or damage to property or injury to persons caused by or arising out of the carriage by Owner of any dangerous or hazardous Goods whether or not declared by the Customer as such pursuant to the terms of clause 7.2(i).
- 7.3 Transit and delivery of Goods:
- (i) Transit shall commence when Owner takes possession of the Goods and the Goods shall be deemed to be delivered when the Goods are tendered at the Site within the customary cartage hours of the district.
 - (ii) If for any reason, other than due to the sole negligence of Owner, Owner is unable to deliver the Goods or any part thereof to the Site, Owner may sell the Goods or part thereof, and payment or tender of the proceeds to the Customer after deduction of all proper Charges and expenses in relation thereto and of all other outstanding Charges in relation to the carriage shall discharge Owner from all liability in respect of such Goods PROVIDED THAT Owner shall do what is reasonable to obtain the market value of the Goods and the power of sale shall not be exercised unless Owner shall have done what is reasonable in the circumstances to give notice to the Customer that the Goods will be sold unless within the time specified in that notice, being a reasonable time in the circumstances for the giving of such notice, the Goods are taken away or instructions are given to Owner by the Customer for their disposal.
- 7.4 Unless the Customer notified Owner of any damage to goods within 48 hours of delivery of the Goods shall be deemed to have been delivered without damage.
- 7.5 If for any reason outside of Owner's control the loading or unloading of Goods exceeds two hours from when the carrier arrives at the Site or if the Site cannot be accessed for reasons not attributable to Owner from the time that Owner would have arrived at the site, Owner shall have the right to increase the charges to take into account increased payments to its employees or contractors and any other disbursements.
- 7.6 In the event that Owner does not itself carry the Goods then it is hereby appointed the agent of the Customer for the purpose of entering into a contract of carriage on behalf of the Customer with any other person, firm, company or statutory body or other organisation provided that such contract of carriage shall contain the same terms and conditions as this Agreement except as to price and that Owner shall be responsible for all charges payable to such further carrier, and Owner shall be paid the Charges under this Agreement by the Customer for the carriage of the Goods notwithstanding any arrangement pursuant to this clause.
- 7.7 All Goods to be carried shall be subject and liable in every respect to all terms, conditions and requirements which may be imposed by any highway, port, harbour, dock, railway, shipping, airways, or any other public authority or government department or officer and any additional expenses or charges arising by reason of such terms and conditions or requirements shall be paid by the Customer.
- 7.8 The carrier is not liable for loss, damage or non-delivery of the goods howsoever occurring even if caused by the carrier's negligence.
- 7.9 Insurance of the Goods will not be effected by Owner to the benefit of the Customer and the Customer shall be responsible for effecting insurance for the Goods at the Customer's expense. Goods remain at the sole risk of Customer.
- 7.10 Should the Customer fail to pay the Charges, Owner is entitled to a possessory lien over any Goods the property of the Customer in Owner's possession or control with respect to the Charges.
- 7.11 This Agreement is, where applicable, subject to the Trade Practises Act 1974 or any State fair trading act.
- 7.12 By signing Consignment Note at time of shipment, Customer confirms they have the authority as owner or owner's agent to enter into the contract. .

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8. PLEASE SEE OWNER DRY HIRE TERMS AND CONDITIONS FOR CONDITIONS SPECIFIC TO DRY HIRE AGREEMENTS

SECTION D WET HIRE**9. CONDITIONS SPECIFIC TO WET HIRE**

- 9.1 Owner shall:
- (i) arrange for delivery to and the return from the Site of the Plant and Equipment;
 - (ii) at its own expense keep and maintain the Plant and Equipment in a proper working order and condition and in good and substantial repair
 - (iii) arrange for the Plant and Equipment to be operated by an Operator who is a properly trained and competent person to operate the Plant and Equipment.
- 9.2 Owner shall:
- (i) be responsible to pay the Operator's remuneration (inclusive of all other benefits required either under contract or at law to be paid to the Operator);
 - (ii) effect a policy of employers' indemnity insurance including workers' compensation insurance in respect of the Operator;
 - (iii) pay the costs of fuel, safety inspections, servicing, maintenance repair and operation in respect of the Plant and Equipment.
 - (iv) Arrange for insurance in respect of the Plant and Equipment, public risk liability and product defect liability.
- 9.3 The Customer shall:
- (i) specify the Site on which the Plant and Equipment is to be operated;
 - (ii) specify the route on the Site for the Plant and Equipment to arrive at the area on which it will be used;
 - (iii) warrant that they are entitled to grant Owner free legal access to the Site;
 - (iv) provide suitable site conditions including proper site access and ground conditions to Owner free of charge in order to perform its hoisting operations
 - (v) ensure that there is sufficient space and amenities for the use of the Plant and Equipment on the Site;
 - (vi) not do or omit to do any out or thing which might in any way invalidate or prejudice any insurance effected by Owner; and
 - (vii) not interfere with the Plant and Equipment or with the Operator's operation of the Plant and Equipment.

SECTION E PPSA

10. **PPSA:** For the purposes of this clause PPSA means the *Personal Property Securities Act 2009* (Cth), including any amendments, replacement and successor legislation, and all terms used herein have the same meaning as set out in that Act unless otherwise defined.
- 10.1 Customer acknowledges and agrees that Clause "16" and "17" apply to the extent that this agreement provides for a "security interest" for the purposes of the PPSA and as such Owner is granted a Security Interest in the Equipment and their Proceeds.
- 10.2 Customer further agrees that::
- (i) the Equipment supplied Owner secures the payment of the Rental of the Equipment and any other Equipment supplied by Owner
 - (ii) it will not register a Financing Change Statement in respect of a Security Interest contemplated or constituted by this Lease Agreement without Owner's prior written consent;
 - (iii) it will not register or permit to be registered a Financing Statement or Financing Change Statement in relation to the Equipment in favour of a third party without Owner's prior written consent;
 - (iv) that the Equipment provided under this Agreement is collateral for the purposes of the PPSA;
 - (v) that this Agreement is a Security Agreement for the purposes of the PPSA;
 - (vi) it will do all the things necessary including providing all information Owner requires to register a Financing Statement or Financing Change Statement (as defined under the PPSA) on the PPS Register ('PPSR') as a Security Interest pursuant to the PPSA;
 - (vii) it will not change its name, ACN or ABN or other details required on the PPSR, without first notifying us;
 - (viii) it waives its rights to receive a verification statement in respect of any Financing Statement or Financing Change Statement in respect of the Security Interest created pursuant to these terms and conditions;
 - (ix) it must pay our costs of any discharge or necessary amendment of any Financing Statement or Financing Change Statement;
 - (x) unless otherwise agreed in writing the parties hereto agree not to disclose information of the kind referred to in section 275(1) of the PPSA to any interested person, or any other person requested by an interested person and the Lessee waives any right it may have but for this clause under section 275(7)(c) of the PPSA to authorise the disclosure of the above information; and
 - (xi) in the event that an Agreement is not executed by the Customer, the delivery and use of the Equipment by the Customer (dry hire), or the delivery and operation of the Equipment by Owner (wet hire) shall constitute adoption or acceptance by the Customer of the terms and conditions set out in the proposed Agreement.

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- 10.3 Customer consents to Owner affecting and maintaining a registration on the Register (in any manner it considers appropriate) in relation to any Security Interest contemplated or constituted by this Agreement in the Equipment and the proceeds arising in respect of any dealing in the Equipment.
- 10.4 Customer agrees to sign any documents and provide all assistance and information to Owner required to facilitate the registration and maintenance of any Security Interest.

11. CONTRACTING OUT

- 11.1 Section 115(1) of the PSSA allows for the contracting out of provisions of the PPSA and to the maximum extent permitted by law, Customer agrees that the following sections of the PPSA will not apply: Sections 95, 96, 118, 121, 125, 130, 132, 135, 142 and 143.
- 11.2 Section 115(7) of the PSSA allows for the contracting out of provisions of the PPSA and to the maximum extent permitted by law, you waive any rights you may have pursuant to, and hereby contract out of the following sections of the PPSA: Sections 127, 129(2) and (3), 130(1), 132, 134(2), 135, 136(3), (4) and (5) and 137.

12. Special Conditions

- 12.1 The special conditions (if any) set out in the Schedule shall form part of this Agreement.
- 12.2 In the event of any inconsistency between the special conditions and any other term of this Agreement, the special conditions shall prevail to the extent of the inconsistency.