

TERMS & CONDITIONS OF SALE: KAESER COMPRESSORS NZ LIMITED

1. INTERPRETATION

In these Terms:

"**Agreement**" means this agreement for the provision of Goods and/or Services by Kaeser to the Customer.

"**Customer**" means a person, firm or corporation, jointly and severally if there is more than one, obtaining the Goods or the Services.

"**Extended Warranty**" has the meaning set out in Kaeser's Warranty Conditions
"**Intellectual Property**" means all copyright, patents, trademarks, names, formulae, specifications, confidential information and all modifications, improvements and enhancements (whether registrable or not) owned by Kaeser or its parent company in respect of the Goods or the Services.

"**Goods**" means the goods specified in Kaeser's order form, or otherwise ordered from Kaeser by the Customer.

"**GST**" means any consumption tax imposed by government, whether at point of supply or at some other specified occurrence, by whatever name, and includes (without limitation) a Goods and Services Tax, a broad based consumption or indirect tax and value-added tax.

"**Kaeser**" means Kaeser Compressors NZ Limited and its contractors successors and assigns.

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

"**Services**" means the services provided by Kaeser at the request of the Customer in respect of the Goods.

"**Specified Distributor Account**" means the ANZ bank account, BSB 013-322, account number 4938-93846, held in the name of Kaeser, for the sole purpose of receiving payments on behalf of Customer and Kaeser.

"**Terms**" means these Terms and Conditions of Sale as amended by Kaeser from time to time.

2. BASIS OF AGREEMENT

2.1 Unless otherwise agreed by Kaeser in writing, the Terms apply exclusively to every Agreement with the Customer and cannot be varied or supplanted by any other terms or conditions (including the Customer's terms and conditions of purchase).

2.2 The descriptions, illustrations and performance specifications of the Goods in the quotation, catalogues, price lists and other advertising material does not form part of this Agreement. Both in the context of this clause and generally, Kaeser and the Customer are both in trade, and contract out of sections 9, 12A and 13 of the Fair Trading Act 1986, it being agreed that it is fair and reasonable to do so given that both parties are contracting out of liability.

3. PRICES

3.1 Any price quoted by Kaeser to the Customer for the Goods or the Services is valid for 30 days and is subject to the Customer entering into Agreement and accepting these Terms in writing.

3.2 Any order placed by the Customer is an offer. Kaeser may in its discretion refuse to accept any offer of the Customer. An order will only be accepted once Kaeser communicates acceptance to the Customer in writing or electronic means or Kaeser has provided the Goods or the Services.

3.3 Prices quoted are exclusive of:

- (a) GST;
- (b) Transportation and delivery costs;
- (c) Insurance; and
- (d) Any other duty or impost.

3.4 The Customer must pay, in addition to the price, any amount incurred by Kaeser as detailed in clause 3.3 in connection with the Goods.

3.5 Where there is any change in the costs incurred by Kaeser in relation to the Goods or the Services, Kaeser may increase its price for the Goods on order to take account of any such change.

3.6 The Customer must pay for all bank fees and charges associated with the payment of Kaeser's invoices.

4. PAYMENT

4.1 Payment for the Goods must be made in full on delivery.

4.2 If credit terms are provided by Kaeser, payment must be made in full within 30 days of the date of invoice in the case of the Goods, otherwise COD in the case of Services and Spare Parts.

4.3 Payment shall not be deemed made until funds have cleared.

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

4.5 If the Customer orders the Goods and/or Services in excess of the credit limit provided by Kaeser, or if Kaeser otherwise directs, Kaeser may require:

- (a) that the Customer directs its customer to make payment of the Customer's invoice which includes the Goods or the Services by way of direct deposit into the Specified Distributor Account; and
- (b) the direction is to be in writing & provided by the Customer, in the form specified by Kaeser; and
- (c) payment is to be for the full amount invoiced by the Customer to its customer.

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

- (a) as to the amount invoiced by Kaeser, for the benefit of Kaeser ("Kaeser's Payment");
- (b) as to any difference between the amount invoiced by Kaeser and the amount paid into the Specified Distributor Account, held on trust as and for the benefit of the Customer ("Customer's Payment").

The Customer's Payment must be electronically transferred to the Customer within 2 working days of receipt in the Specified Distributor Account of the full or each instalment of the amount invoiced.

4.7 If any payment is received directly by the Customer which should have been made into the Specified Distributor Account, the Customer receives it on trust for Kaeser and must immediately pay the full amount of the payment to the Specified Distributor Account and notify Kaeser in writing.

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

5. PAYMENT DEFAULT

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

- (a) charge the Customer compounding interest on any sum due at the # rate charged by # as at date the due date above plus 4 per cent for the period from the due date until the date of payment in full;
- (b) charge the Customer a late payment administration fee of \$145 per invoice;
- (c) charge the Customer for all expenses and costs (including legal costs and disbursements on an indemnity basis) incurred by it resulting from the default and in taking whatever action it deems appropriate to recover any sum due;
- (d) cease or suspend for such period as Kaeser thinks fit, supply of any further Goods or Services to the Customer;
- (e) by notice in writing to the Customer, terminate any agreement with the Customer so far as unperformed by Kaeser; without effect on accrued rights of Kaeser under any agreement
- (f) set-off Customer Payments held in the Specified Distributor Account against the amount owing against; without effect on accrued rights of Kaeser under any agreement.

5.2 Clauses 5.1(d) and (e) may also be relied upon, at the option of Kaeser:

- (a) where the Customer is an individual and becomes bankrupt or enters into any scheme of arrangement or any assignment or composition with or for the benefit of his or her creditors or any class of his or her creditors generally; or
- (b) where the Customer is a corporation and it enters into any scheme of arrangement or any assignment or composition with or for the benefit of its creditors or any class of its creditors generally, or has a liquidator, provisional liquidator, administrator, receiver or receiver and manager appointed, or any action is taken for, or with the view to, the liquidation (including provisional liquidation), winding up or dissolution without winding up of the Customer.

5.3 If clauses 5.2(a) or (b) apply and funds have been paid to the Specified Distributor Account pursuant to clauses 4.5 - 4.7, the Customer is entitled only to the Customer Payment portion of such funds. The Customer has no right or entitlement to the Kaeser Payment portion.

6. PASSING OF PROPERTY

6.1 Until full payment in cleared funds is received by Kaeser for all Goods supplied by it to the Customer, as well as all other amounts owing to Kaeser by the Customer:-

- (a) title and property in all Goods remain vested in Kaeser and do not pass to the Customer until all Goods have been paid for;
- (b) Until payment is made, whether or not the Goods have been purchased for resale, the Customer will, store the Goods separately from goods not supplied by Kaeser, will not mix the Goods with any other goods, and will hold the Goods as bailee for Kaeser.
- (c) Where the Goods have been purchased for resale, the Customer is authorised to resell the Goods in the ordinary course of business but that authority may be revoked by Kaeser at any time and will be deemed automatically revoked if the Customer fails to pay any money to Kaeser on the due date or any events specified in clause 5.2 occur. Where the Goods have not been purchased for resale, then until the Customer has paid for them in full, the Customer may not re-sell them or any of them without Kaeser's written consent and in any event, may only re-sell the Goods in the ordinary course of business (our title to and security interest in the Goods will continue).
- (d) At any time after payment is due, Kaeser may enter any premises where the Goods are stored to take possession of them. If the Goods have become fixtures, then subject to the rights of any third parties, Kaeser may do whatever is required to take possession of them. Kaeser will not be liable for the costs, losses, damages, expenses or any other monies or losses suffered by the Customer as a result of Kaeser retaking possession of the Goods.
- (e) If there is any doubt as to whether any goods in the Customer's possession or held on their behalf belong to Kaeser or to the Customer, Kaeser's decision will be final and conclusive except in the case of manifest error (the onus of proving such being on the Customer).
- (f) If the Customer resells the Goods or any of them before payment is made to Kaeser for the Goods the Customer will hold the sale proceeds and any resultant book debts in trust for Kaeser and account to Kaeser for all monies owed by the Customer to Kaeser.
- (g) For the purposes of the PPSA:
 - (i) The Customer acknowledges that Kaeser has a purchase money security interest in goods supplied by it (and in any new goods into which the Goods have been manufactured, processed, assembled or commingled such that their original identity is lost, and in all proceeds including without limitation money, accounts receivable, insurance proceeds in relation to any of those Goods and any goods for which any of those Goods have been exchanged or traded or that have been acquired in lieu of those Goods) to secure the price payable for the Goods;
 - (ii) The Customer acknowledges that Kaeser also has a general security interest in all Goods supplied by it from time to time and all proceeds to secure all monies of any kind owing by the Customer to Kaeser at any time
 - (iii) The Customer waives their right to receive a copy of the verification statement confirming registration of a financing statement or a financing change statement relating to Kaeser's security interests;
 - (iv) The Customer will, if Kaeser requests, sign any documents (including any new contracts), provide all the necessary information, and do everything required by Kaeser to ensure that its purchase money security interest and its general security interest are perfected. The Customer will not allow or enable any other person to obtain any security interest in respect of Goods supplied by Kaeser (or proceeds) while the price for those Goods remains unpaid;

TERMS & CONDITIONS OF SALE: KAESER COMPRESSORS NZ LIMITED

- (v) Kaeser may at its discretion and in such manner as it determines allocate payments made by the Customer for any Goods supplied by Kaeser;
- (vi) Where Kaeser takes possession of the Goods, it may (in its absolute discretion), pursuant to s107(1), and despite the wording of s109 and in addition to its rights under s109 (if any), sell the Goods by any means at any time and from any sale proceeds, deduct all costs incurred in connection with the sale and, to the extent to which Kaeser relies on its general security interest, all monies owed (even if not due and payable) by Customer to Kaeser on any account (to the extent to which Kaeser has priority over any other interested parties). Kaeser may recover from the Customer any shortfall on any sale or attempted sale.
- (vii) The Customer waives their rights under sections 114(1)(a) (notice of sale), 116 (statement of account), 117(1) (distribution of surplus sale proceeds), 119 (recover surplus), 120(2) and 121 (receive notice of any proposal to retain goods and object to any proposal), 125 (removal of accession and damage caused when removing accession), 129 (notice of removal of accession), 131 (right to seek Court order as to removal of accession), s132 (entitled persons may redeem collateral) and 133-134 inclusive (reinstatement of Agreement) of the PPSA.
- 7. RISK AND INSURANCE**
- 7.1 The risk in the Goods and all insurance responsibility for theft, damage or otherwise in respect of the Goods will pass to the Customer immediately upon **acceptance of an order from the Customer by Kaeser**.
- 7.2 The Customer assumes all risk and liability for loss or damage or injury to persons or to property of the Customer or third parties, arising out of the use or possession of any of the Goods.
- 7.3 If the Goods remain on Kaeser's premises or with a carrier due to the failure by the Customer to take delivery, the Goods shall remain at the Customer's risk from the date and time of the attempted delivery and Kaeser may charge the Customer for additional expenses incurred for storage and handling of the Goods.
- 7.4 If marine insurance is covered by Kaeser, any transport damage claim must be made within 72 hours from acceptance of delivery.
- 8. PERFORMANCE OF CONTRACT**
- 8.1 Kaeser will, at its discretion, arrange for the delivery of the Goods to the Customer and will designate the route and means of transportation.
- 8.2 Kaeser will deliver the Goods to the Customer at the address specified in the order form or as otherwise agreed.
- 8.3 Kaeser's delivery record shall be prima facie proof of the contents stated therein.
- 8.4 Any date for delivery of the Goods or provision of the Services stated by Kaeser is intended as an estimate only and is not a contractual commitment. Kaeser will use its best reasonable endeavours to meet any estimated dates for delivery of the Goods or completion of the Services. Kaeser reserves its right to vary delivery or completion dates as necessary.
- 8.5 No claim for shortages will be considered unless Kaeser is given written notice of the claim within seven (7) days from the date of receipt of the Goods by the Customer.
- 8.6 The Customer irrevocably indemnifies Kaeser against any and all loss or damage suffered by Kaeser as a result of delivery, except where caused by Kaeser's negligence.
- 9. INTELLECTUAL PROPERTY**
- 9.1 The Customer acknowledges that it has no proprietary right or interest in the Intellectual Property.
- 9.2 The Customer must not register or record or attempt to register or record anywhere in the world the Intellectual Property or any part thereof or any patents, inventions, trademarks or designs derived from or similar to the Intellectual Property or aid or abet anyone else in doing so.
- 9.3 The Customer must not at any time create, sell, manufacture or process any products using or taking advantage of the Intellectual Property.
- 9.4 Any Intellectual Property provided to the Customer by Kaeser in connection with the Goods or the Services remains the exclusive property of Kaeser and must be returned to Kaeser on demand and shall not be copied or communicated to any third party without the express prior written consent of Kaeser.
- 10. LIABILITY & WARRANTIES**
- 10.1 Replacement or repair of the Goods or re-provision of the Services at Kaeser's discretion is the absolute limit of Kaeser's liability arising under or in connection with the description, quality, condition, performance, assembly, manufacture, design, merchantability or fitness for purpose of the Goods or Services or alternatively the sale, use of, storage or any other dealings with the Goods or Services by the Customer or any third party.
- 10.2 Kaeser is not liable for any indirect or consequential losses or expenses suffered by the Customer or any third party, howsoever caused, including but not limited to loss of turnover, profits, business or goodwill or any liability to any other party.
- 10.3 The Customer irrevocably indemnifies Kaeser against any claim by any third party arising out of or any way connected with the Goods or Services.
- 10.4 Kaeser will not be liable for any loss or damage suffered by the Customer where Kaeser has failed to meet any delivery date or cancels or suspends the supply of the Goods or the Services.
- 10.5 Except as expressly provided in these Terms or Kaeser's Warranty Conditions, all warranties, conditions and guarantees implied by law as to merchantability, description, quality, suitability or fitness of the Goods for any purpose or as to design, assembly, installation, materials, workmanship or otherwise are hereby expressly excluded. The Customer warrants that all purchases under this Agreement are for commercial purposes only and, accordingly, the provisions of the Consumer Guarantees Act 1993 do not apply.
- 10.6 Kaeser shall not be liable to the Customer in respect of any reasonable variation between any sample and the Goods actually supplied to the Customer.
- 10.7 Any performance or output figures supplied in respect of the Goods are estimates.
- 10.8 Nothing in these Terms is to be interpreted as excluding, restricting or modifying or having the effect of excluding, restricting or modifying the application of any State or Federal legislation applicable to the sale of Goods or the provision of Services which cannot be excluded, restricted or modified.
- 10.9 Unless expressly provided on Kaeser's order form, or otherwise expressly agreed in writing by Kaeser, the Normal Warranty is the only warranty given to the Customer, and the terms of that warranty form part of this Agreement.
- 10.10 Warranty shall not cover claims where:
- (a) the Customer fails to give written notice of the claim to Kaeser within seven (7) days of the claim arising, or having done so, fails to return the Goods to Kaeser within a further fourteen (14) days together with a detailed written defect statement;
- (b) the Goods have been subjected to abnormal conditions, whether of temperature, humidity, pressure, stress or similar;
- (c) the Goods have not been used in accordance with Kaeser's instructions, recommendations or specifications or have been misused, abused, neglected, improperly installed, stored or maintained or have been involved in an accident;
- (d) the Goods have been affected by corrosion, erosion or normal wear and tear;
- (e) parts and accessories used in connection with the Goods have not been manufactured or approved by Kaeser;
- (f) unauthorised repairs or alterations have been made to the Goods; or
- (g) the Goods are damaged due to any power surge or other fault in the supply of electricity.
- 10.11 If on an inspection of the Goods, Kaeser determines that the Goods are not covered by the Normal Warranty or the Extended Warranty then Kaeser's usual charges for service work and testing will apply.
- 10.12 Goods covered by the Normal Warranty or the Extended Warranty must be returned to Kaeser (and subsequently re-delivered) at the Customer's risk and cost.
- 10.13 All new capital equipment manufactured by Kaeser and sold directly by Kaeser is covered by a 12 month warranty period. Warranty is conditional upon:**
- (a) equipment installation commissioned and approved by Kaeser personnel or personnel authorised by Kaeser;
- (b) equipment maintained and serviced according to the guidelines found in the equipment's operating instructions manual;
- (c) equipment maintained and serviced by Kaeser personnel or personnel authorised by Kaeser.
- 10.14 Genuine spare parts manufactured by Kaeser and sold by Kaeser directly, are covered by a 3 month limited warranty. The Normal Warranty conditions apply.**
- 11. RETURNS**
- 11.1 Kaeser will not be liable for any defects, shortages, damage or non-compliance with the Agreement unless:
- (a) the Customer notifies Kaeser with full details within seven (7) days of delivery, specifying the shortage or defect; and
- (b) Kaeser is given an opportunity to inspect the Goods and investigate the complaint before any further dealing.
- 11.2 If the Customer fails to give notice in accordance with clause 11.1, then the Customer is deemed to have accepted the Goods and the Services and will be bound to pay for them.
- 11.3 Kaeser must first grant a written acceptance to the Customer before the return/exchange of any Goods.
- 11.4 Where Kaeser accepts any claim for defects, shortages, damage or non-compliance with this Agreement, Kaeser may at its option replace the Goods or refund the price of the Goods or the Services.
- 11.5 Any Goods that the Customer wishes to return must be in their original condition and packaging and will incur a minimum re-stocking fee of 15% of the purchase price. This fee covers testing, computer processing, handling and packaging. Costs for transportation and damage will be borne by the Customer.
- 11.6 Kaeser will not under any circumstances accept any Goods for return that:
- (a) are not in their original condition and packaging;
- (b) have been altered in any way; or
- (c) have not been handled, stored or installed in accordance with Kaeser's instructions.
- 11.7 Kaeser will not accept return/exchange of Goods made to order.
- 12. CANCELLATION**
- 12.1 If, through circumstances beyond the control of Kaeser, it is unable to effect delivery or provision of the Goods or provide the Services, then Kaeser may cancel the Customer's order (even if it has already been accepted) by notice in writing to the Customer.
- 12.2 No purported cancellation or suspension of an order or any part thereof by the Customer is binding on Kaeser after that order has been accepted by Kaeser, and the Customer agrees to indemnify Kaeser for any loss or damage arising from the cancellation. Kaeser will charge a minimum fee of 5% of list price for cancellation of order to cover administration costs. Kaeser may charge additional fees for non-stock items.
- 13. PRIVACY**
- 13.1 Kaeser will comply with the Privacy Act 1993 where it applies, as amended from time to time.
- 13.2 Kaeser requires that the Customer comply with the *National Privacy Principles* in connection with any personal information supplied to it by Kaeser in connection with any agreement between the Customer and Kaeser.
- 14. FORCE MAJEURE**
- 14.1 Kaeser shall not be liable for breach of the Agreement if and to the extent that fulfilment of a term or condition has been prevented, hindered or delayed by force majeure, and in such event that time for fulfilment of such a term shall be extended for such period as is reasonable in all the circumstances.
- 14.2 "Force majeure" means any event or circumstances beyond Kaeser's immediate control, including without prejudice to the generality of the foregoing, strikes, fires, explosions, lock-outs, trade disputes, injunction, accident to plant or machinery, shortage of any material, riots, act of terrorism, civil commotion, war national or international, interruption of transport, inability to obtain supplies, emergency,

TERMS & CONDITIONS OF SALE: KAESER COMPRESSORS NZ LIMITED

destruction or damage due to natural forces, fire, flood, explosion, and compliance with orders or requests of any national or local authority.

15. MISCELLANEOUS

- 15.1 These Terms are governed by the laws of New Zealand and the parties agree to the non-exclusive jurisdiction of the courts and tribunals of New Zealand
- 15.2 Failure by Kaeser to enforce any of its rights under these Terms on any occasion shall not be construed as a waiver of its rights.
- 15.3 If any term or condition is unenforceable it must be read down so as to be enforceable, or if it cannot be read down, the term or condition may be severed from these Terms without affecting the enforceability of the remaining Terms.