

## Motordrives Australia Pty Ltd trading as Tuffwinch – General Terms & Conditions of Trade

### 1. Definitions

- 1.1 “Company” shall mean Motordrives Australia Pty Ltd (ABN 74 133 303 385), its subsidiaries, its successors and assigns.
- 1.2 “Customer” shall mean the Customer or any person acting on behalf of and with the authority of the Customer.
- 1.3 “Guarantor” means that person (or persons), or entity who agrees herein to be liable for the debts of the Customer on a principal debtor basis.
- 1.4 “Goods” shall mean Goods supplied by the Company to the Customer (and where the context so permits shall include any supply of Services as hereinafter defined).
- 1.5 “Services” shall mean all services supplied by the Company to the Customer and includes any advice or recommendations (and where the context so permits shall include any supply of Goods as defined supra).
- 1.6 “Price” shall mean the cost of the Goods as agreed between the Company and the Customer subject to clause 4 of these terms and conditions.

### 2. Acceptance

- 2.1 Any instructions received by the Company from the Customer for the supply of Goods and/or the Customer’s acceptance of Goods supplied by the Company shall constitute acceptance of the terms and conditions contained herein.
- 2.2 Where more than one Customer has entered into this agreement, the Customers shall be jointly and severally liable for all payments of the Price.
- 2.3 Upon acceptance of these terms and conditions by the Customer the terms and conditions are irrevocable and can only be rescinded in accordance with these terms and conditions or with the written consent of the manager of the Company.
- 2.4 None of the Company’s agents or representatives are authorised to make any representations, statements, conditions or agreements not expressed by the manager of the Company in writing nor is the Company bound by any such unauthorised statements.
- 2.5 The Customer undertakes to give the Company not less than fourteen (14) days prior written notice of any proposed change in the Customer’s name and/or any other change in the Customer’s details (including but not limited to, changes in the Customer’s address, facsimile number, or business practice).

### 3. Goods

- 3.1 The Goods are as described on the invoices, quotation as provided by the Company to the Customer.

### 4. Price And Payment

- 4.1 At the Company’s sole discretion the Price shall be either;
- (a) as indicated on invoices provided by the Company to the Customer in respect of Goods supplied; or
- (b) the Company’s current Price, at the date of delivery of the Goods, according to the Company’s current Price list; or
- (c) be the Company’s quoted Price (which shall be binding upon the Company unless the Customer rejects in writing the Company’s quotation within thirty (30) days.
- 4.2 At the Company’s sole discretion a deposit may be required. The deposit amount or percentage of the Price will be stipulated at the time of the order of the Goods and shall become immediately due and payable.
- 4.3 Time for payment for the Goods shall be of the essence and will be stated on the invoice,

quotation or any other order forms. If no time is stated then payment shall be on delivery of the Goods.

4.4 The Company may withhold delivery of the Goods until the Customer has paid for them, in which event payment shall be made before the delivery date.

4.5 At the Company’s sole discretion, payment for approved Customers shall be made by installments in accordance with the Company’s written delivery/payment schedule.

4.6 At the Company’s sole discretion, payment for approved Customer’s shall be due on thirty (30) days following the end of the month in which a statement is delivered to the Customer’s address or address for notices by the method as stated on the Credit Application.

4.7 Payment will be made by cash on delivery, or by cheque, or by bank cheque, or by credit card, or by direct credit, or by any other method as agreed to between the Customer and the Company.

4.8 The Price shall be increased by the amount of any GST and other taxes and duties which may be applicable, except to the extent that such taxes are expressly included in any quotation given by the Company.

### 5. Delivery Of Goods / Services

5.1 Delivery of the Goods shall be made to the Customer’s nominated address. The Customer shall make all arrangements necessary to take delivery of the Goods whenever they are tendered for delivery, or delivery of the Goods shall be made to the Customer at the Company’s address.

5.2 The failure of the Company to deliver shall not entitle either party to treat this agreement as repudiated.

5.3 The Company shall not be liable for any loss or damage whatever due to the failure by the Company to deliver the Goods promptly or at all.

5.4 The Company does not accept any responsibility for loss or breakage of Goods in transit.

### 6. Risk

6.1 The Company retains property and title in the Goods until it has received payment in full for all sums due and owing on any account by the Customer, nonetheless, all risk for the Goods passes to the Customer on delivery.

6.2 The Customer acknowledges that they are liable for any loss or damage to the Goods from the time of delivery.

6.3 The Customer shall keep the Company indemnified against all liability in respect of all actions, proceedings, claims, damages, costs and expenses.

6.4. To the extent permitted by law the Company excludes any liability to the Customer in agreement, tort or statute or in any way for any injury, damage or loss of any kind whatsoever (including without limitation any liability for direct, indirect, consequential loss or damage) sustained by the Customer and/or any other person, or for any costs, charges or expenses incurred by the Customer arising from or in connection with the Goods and/or the Services provided by the Company and/or any act or omission of the Company.

6.5. If the Customer sells or otherwise disposes of the goods before payment in full has been made, the Customer will hold all monies received for the goods by it from such sale or disposal in trust for the Company and will on request furnish the Company with the names and addresses of the persons to whom such disposals have been made together with all necessary particulars to enable

the Company to recover any outstanding sum due from such person.

6.6. So long as the property in the Goods remains with the Company, the Customer will hold the Goods as bailee for the Company and will store the Goods so as to clearly show them to be goods of the Company and the Company will have the right, without prejudice to the obligations of the Customer to purchase the Goods, to retake possession of the Goods (and for that purpose to go upon any premises occupied by the Customer).

6.7. The Company may maintain an action for the price of the Goods notwithstanding that property in the Goods has not vested in the Customer.

### 7. Customer’s Disclaimer

7.1 The Customer hereby disclaims any right to rescind, or cancel the agreement or to sue for damages or to claim restitution arising out of any misrepresentation made to the Customer by any servant or agent of the Company and the Customer acknowledges that it buys the Goods relying solely upon his own skill and judgment and that the Company shall not be bound by nor responsible for any term, condition, representation or warranty other than the warranty given in Clause 9 or by the Manufacturer which warranty shall be personal to the Customer and shall not be transferable to any subsequent Customer.

7.2 The Customer indemnifies the Company against the destruction or loss of the Goods by any means or for any reason whatsoever, including lawful confiscation.

### 8. Cancellation

8.1 The Company may cancel these terms and conditions or cancel delivery of Goods at any time before the Goods are delivered by giving written notice. The Company shall not be liable for any loss or damage whatever arising from such cancellation.

8.2 The Customer must give twenty-four (24) hours notice to the Company of any cancellation of any delivery or Order failing which the Company is at liberty to charge the Customer for the Price of the Goods.

### 9. Warranty

9.1 The Company warrants that the Goods supplied shall be of merchantable quality. This warranty is valid for 36 months from the date the Goods are received by the Customer.

9.2 During the warranty period the Company guarantees that the repair or replacement will be made from its Company address or from another address indicated by it. Repairs or replacements of faulty components are authorised at the Company’s discretion. The warranty covers the Company’s labour costs and the material used in order to repair the Goods. The warranty does not cover other expenses such as transport costs of the Goods, travel and accommodation costs of the Company’s personnel when carrying out repairs on site or the cost of the Customer’s employees.

9.3 The warranty does not cover Goods which have been damaged due to the follows: negligence or improper use; damage caused by water; damage caused in transit; damage caused by an unsuitable application; damage caused by repairs carried out by the Customer; damage caused by unsuitable environmental conditions; damage caused by components subject to standard wear and tear; specifications and regulations relating to the machine on which the Company’s Goods are installed are not respected.

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- 9.4 The payment of compensation for any failure or abnormal operation is generally excluded.
- 9.5 The Company does not warrant that the Goods are fit for a particular purpose and, except or unless otherwise stated in these terms and conditions, warranties relating to title, defects or conformity of the Goods are expressly excluded. Any costs associated with the return of the Goods for the purpose of a warranty claim shall be the responsibility of the Customer.
- 10. Defects**
- 10.1 The Customer shall inspect the Goods upon delivery and notify the Company in writing within twenty-four (24) hours of any defects, short deliveries or any failure to fulfill any quotation or order.
- 10.2 In the event that no written notification is received by the Company from the Customer within twenty-four (24) hours of delivery of the Goods, the Goods are taken to be fit for their purpose and no other.
- 11. Fair Trading Acts**
- 11.1 Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the Commonwealth *Trade Practices Act 1974*, the *Competition and Consumer Act 2010* (Cth), or the Fair Trading Acts in each of the States and Territories of Australia, except to the extent permitted by those Acts where applicable.
- 12. Default & Consequences of Default**
- 12.1 Interest on overdue invoices shall accrue from the date when payment becomes due, daily until the date of payment, at a rate of 9% compounding per calendar month and shall accrue at such a rate as an administration charge. The Customer agrees that that this is a fair and reasonable charge and is directly relevant to the likely damage that the Company might suffer as a result of non payment by the Customer. Interest will be calculated on all outstanding amounts from the date of issue of the invoice.
- 12.2 If the Customer defaults in payment of any invoice when due, the Customer shall indemnify the Company from and against all the Company's costs and disbursements, including legal costs on an indemnity basis or on a solicitor and own client basis whichever is the higher and in addition all of the Company's nominees costs of collection inclusive of debt collection and agency fees and commissions.
- 12.3 Without prejudice to any other remedies the Company may have, if at any time the Customer is in breach of any obligation (including those relating to payment); the Company may suspend or terminate the supply of Goods to the Customer and any of its other obligations under the terms and conditions. The Company will not be liable to the Customer for any loss or damage the Customer suffers because the Company exercised its rights under this clause.
- 12.4 In the event that:
- any money payable to the Company becomes overdue, or in the Company's opinion the Customer will be unable to meet its payments as they fall due; or
  - the Customer becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
  - a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed
- in respect of the Customer or any asset of the Customer;
- Then without prejudice to the Company's other remedies at law:
- the Company shall be entitled to cancel all or any part of any order of the Customer which remains unperformed in addition to and without prejudice to any other remedies; and
  - all amounts owing to the Company shall, whether or not due for payment, immediately become payable in addition to the interest payable under clause 12.1 hereof; and
  - Outstanding monies shall be recoverable forthwith from the Customer as a liquidated debt together with any interest accrued and costs.
- 13. Security and Charge**
- 13.1 Despite anything to the contrary contained herein or any other rights which the Company may have howsoever:
- Where the Customer and/or the Guarantor (if any) is the proprietor of land, realty or any other asset capable of being charged, both the Customer and/or the Guarantor agree to mortgage and/or charge all of their joint and/or several interest in the said land, realty or any other asset to the Company or the Company's nominee to secure all amounts and other monetary obligations payable under the terms and conditions. The Customer and/or the Guarantor acknowledge and agree that the Company (or the Company's nominee) shall be entitled to lodge where appropriate a caveat, which caveat shall be released once all payments and other monetary obligations payable hereunder have been met.
  - Should the Company elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Customer and/or Guarantor shall indemnify the Company from and against all the Company's costs and disbursements including legal costs on a full indemnity basis or a solicitor and own client basis whichever is the higher.
  - To give effect to the provisions of clause [13.1 (a) and (b)] inclusive hereof the Customer and/or the Guarantor (if any) do hereby irrevocably nominate constitute and appoint the Company or the Company's nominee as the Customer's and/or Guarantor's true and lawful attorney to execute mortgages and charges (whether registerable or not) including such other terms and conditions as the Company and/or the Company's nominee shall think fit in his/her/its/their absolute discretion against the joint and/or several interest of the Customer and/or the Guarantor in any land, realty or asset in favour of the Company and in the Customer's and/or Guarantor's name as may be necessary to secure the said Customer's and/or Guarantor's obligations and indebtedness to the Company and further to do and perform all necessary and other acts including instituting any necessary legal proceedings, and further to execute all or any documents in the Company's absolute discretion which may be necessary or advantageous to give effect to the provisions of this clause.
- 14. Personal Properties Security Act ("PPSA")**
- 14.1 Upon assenting to these terms and conditions in writing the Customer acknowledges and agrees that these terms and conditions constitute a security agreement for the purpose of the PPSA and creates a security interest in all Goods that have previously been supplied and that will be supplied in the future by the Company to the Customer.
- 14.2 The Customer undertakes to:
- promptly sign any further documents and/or provide any further information (such information to be complete, accurate and up to date in all respects) which the Company may reasonably require to register a financing statement or financing change statement in relation to a security interest on the Personal Property Securities Register or register any other document required to be registered by the PPSA.
  - indemnify, and upon demand reimburse the Company for all expenses incurred in registering a financial statement on the Personal Property Securities Register established by the PPSA or releasing any Goods charged thereby;
  - not register a financing change statement in respect of a security interest without prior written consent of the Company;
  - not register, or permit to be registered, a financing statement or a financing change statement in relation to the goods in favour of a third party without prior written consent of the Company;
  - immediately advise the Company of any material changes in its business practices of selling the goods which would result in a change to the nature of proceeds derived from such sales.
- 14.2 The Company and the Customer agree that sections 96 and 125 of the PPSA do not apply to the security agreement created by these terms and conditions.
- 14.3 The Customer waives its rights to receive notices under sections 95, 118, 121(4), 130 and 132(4) of the PPSA.
- 14.4 The Customer waives their right as a grantor and/or a debtor under sections 142 and 143 of the PPSA.
- 14.5 Unless otherwise agreed in writing by the Company, the Customer waives their right to receive a verification statement in accordance with section 157 of the PPSA.
- 14.6 The Customer must unconditionally ratify any actions taken by the Company under this Clause 4.
- 14.7 Subject to any express provisions to the contrary nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.
- 14.8 The Customer must not:
- create any security interest or lien over any of the Company's personal property whatsoever (other than security interests granted in favour of the Customer);
  - sell, lease or dispose of its interest in the Company's personal property;
  - give possession of the Company's personal property to another person except where the Company expressly authorises it to do so;
  - permit any of the Company's personal property to become an accession to or commingled with any asset that is not part of the goods.
- 15. Return Policy**
- 15.1 Goods may only be returned pursuant to relevant Commonwealth Legislation. The Company will at its option either:
- replace the Goods; or

(b) grant Customer credit against future purchasers in an amount equal to the purchase price of the Goods.

- 15.2 Returned Goods will be accepted within seven (7) days from the date of delivery and the cost of the return shall be borne by the Customer. The Company reserves the right to charge a 20% administrative charge to the Customer.

**16. General**

- 16.1 If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 15.2 All Goods supplied by the Company are subject to the laws of Victoria and the Company takes no responsibility for changes in the law which affect the Goods supplied. The Customer irrevocably submits to the jurisdiction of Victoria and the Melbourne Registry of the appropriate Court or Tribunal in the event of any dispute.
- 15.3 The Company shall be under no liability whatever to the Customer for any indirect loss and/or expense (including loss of profit) suffered by the Customer arising out of a breach by the Company of these terms and conditions.
- 15.4 In the event of any breach of this agreement by the Company the remedies of the Customer shall be limited to damages. Under no circumstances shall the liability of the Company exceed the Price of the Goods.
- 15.5 The Customer shall not set off, deduct or reduce against the Price, any amounts due from the Company.
- 15.6 The Company may license or sub-contract all or any part of its rights and obligations without the Customer's consent.
- 15.7 The Company reserves the right to review these terms and conditions at any time and from time to time. If, following any such review, there is to be any change in such terms and conditions, that change will take effect from the date on which the Company notifies the Customer of such change.
- 15.8 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock out, industrial action, fire, flood, drought, storm or other event beyond the reasonable control of either party.
- 15.9 The Customer acknowledges that the credit application once approved by the Company will be scanned as an image. Should it be necessary to prove the existence of this document, the Customer agrees that an image retrieved and certified by an employee of the Company as being an image retrieved and printed into hard copy form shall be deemed to be conclusive proof of the existence of this document.