

GENERAL TERMS AND CONDITIONS OF TRADE

1. DEFINITIONS

In these Terms:

"Goods" means goods supplied by the Seller to the Purchaser under an Agreement, and include, as applicable, any engines, cylinder heads and other engine parts and components.

"License" means any import, export, currency or other license, consent or authority required to be obtained or held in relation to the Goods or Services.

"Machining Services" means any cleaning, inspection, re-building and reconditioning services in relation to any engines and engine components,

"Price List" means the Seller's usual price list for the Goods and Services as amended from time to time.

"Purchaser" means any person, firm or corporation, jointly and severally if there is more than one, acquiring Goods or Services from the Seller.

"Quotation" means any written or verbal quotation provided by the Seller to the Purchaser concerning the proposed supply of Goods or Services.

"Seller" means whichever of the following companies supply Goods or Services to the Purchaser:

Head Mod Nominees Pty Ltd (ABN 68 664 066 108) t/as HM GEM Engines, HM GEM Machining Services, Delta Machining Services, Motafit & Southcott Engines.

"Services" means all services provided by the Seller to the Purchaser under an Agreement, and includes, as applicable, the Machining Services, any installation services and any mechanical repairs and maintenance services.

"Terms" means these General Terms and Conditions of Trade.

"Used Goods" means any goods that have been put to use by a person prior to the sale to the Purchaser.

"Vehicle" means any plant, equipment, machinery, engine, vehicle or part of a vehicle provided by the Purchaser to the Seller for the purpose of obtaining any Goods or Services.

2. BASIS OF AGREEMENT

2.1 Goods and Services are supplied by the Seller to the Purchaser only on these Terms which shall apply to the exclusion of any other terms.

2.2 Any Quotation is:

- (a) valid for 30 days;
- (b) an invitation to treat only; and
- (c) subject to the Purchaser offering to enter into an Agreement and accepting these Terms.

2.3 The Terms may include additional terms in the Seller's Quotation.

2.4 The Agreement is accepted by the Seller when the Seller confirms its acceptance of an order from the Purchaser in writing or electronic means or provides the Purchaser with the Goods or Services.

2.5 The Seller may in its absolute discretion refuse to accept any order from the Purchaser.

2.6 All descriptive matter and specifications, drawings and particulars of weights and dimensions provided by the Seller or at any time contained in the Seller's catalogue, price lists or advertising matter are merely illustrative of the Goods and Services described therein, and none of these shall form part of the Agreement.

3. PRICE

3.1 Unless otherwise agreed in writing, the price payable for the supply of Goods or Services:

- (a) is as stated in the Seller's Price List;
- (b) excludes any transportation charges arising from the Seller's point of dispatch of the Goods and Services to the Customer to the point of delivery;
- (c) excludes GST and any other taxes or duties imposed on or in relation to the Goods and Services.

3.2 In addition to payment of the price of the Goods and Services, the Purchaser must also pay any amounts referred to in clauses 3.1(b) and (c).

3.3 If the Purchaser requests any variation to the Agreement, the Seller may increase the price to account for such variation.

3.4 If there is any change in the Seller's costs incurred in relation to providing the Goods or Services (including without limitation changes in manufacturer's prices, rates of exchange, landing charges, port dues, and the costs of carriage, insurance and handling), the Seller may vary the price to take account of any such change, by notifying the Purchaser.

4. PAYMENT

4.1 Unless otherwise agreed in writing, payment for the Goods and Services must be made by the Purchaser to the Seller in full.

4.2 The Seller reserves the right to require payment in full immediately on delivery of the Goods or completion of the Services.

4.3 Payment by cheque is not deemed made until the proceeds of the cheque have cleared.

4.4 Payment terms may be revoked or amended at the Seller's sole discretion immediately upon giving the Purchaser written notice.

4.5 Payment must be made by the Purchaser to the Seller without any deduction or set-off.

5. PAYMENT DEFAULT

5.1 If the Purchaser defaults in payment by the due date of any amount payable to the Seller, then all money which would become payable by the Purchaser to the Seller at a later date on any account becomes immediately due and payable without the requirement of any notice to the Purchaser, and the Seller may, without prejudice to any other remedy available to it:

- (a) charge the Purchaser interest on any sum due at the [rate of two per cent (2%) per annum above the maximum overdraft rate of the Seller's bankers for the time being in force OR 2% per month OR the prevailing rate pursuant to the Penalty Interest Rates Act 1983 plus 2% for the period from the due date until the date of payment in full;
- (b) charge the Purchaser for, and the Purchaser must indemnify the Seller from, all costs and expenses (including all legal costs on an indemnity basis and debt collector's commission) incurred by the Seller resulting from the Purchaser's default, or in taking action to enforce compliance with the Terms, or to recover any sum due, or to recover any Goods;
- (c) cease or suspend for such period as the Seller thinks fit, supply of any further Goods or Services to the Purchaser;
- (d) by written notice to the Purchaser, terminate any Agreement with the Purchaser so far as unperformed by the Seller, without effect on the Seller's accrued rights under any Agreement.

5.2 Clauses 5.1(c) and (d) can also be relied upon, at the Seller's option where the Purchaser becomes bankrupt or insolvent or enters into any scheme of arrangement with its creditors or has a liquidator or similar functionary appointed in respect of its assets.

6. TITLE

6.1 Until the Seller receives full payment in cleared funds from the Purchaser for all Goods and Services supplied by it to the Purchaser, as well as all other amounts owing to the Seller by the Purchaser:

- (a) Title and property in all Goods remains vested in the Seller and does not pass to the Purchaser;
- (b) The Purchaser must hold the Goods as fiduciary bailee and agent for the Seller;
- (c) The Purchaser must keep the Goods separate from its own goods and maintain the Seller's labeling and packaging;
- (d) the Purchaser is required to hold the proceeds of any sale of the Goods on trust for the Seller in a separate account however failure to do so will not affect the Purchaser's obligation to deal with the proceeds as trustee;
- (e) The Seller may, without notice, enter any premises where it suspects the Goods may be and remove them, notwithstanding that the Goods may have been attached to other goods not the property of the Seller, and for this purpose the Purchaser irrevocably licenses the Seller to enter such premises and also indemnifies the Seller from and against all costs, claims, demands or actions by any party arising from such action.

- 6.2 The Purchaser must inform the Seller immediately of any levy of execution or attempt to levy execution by any third party against the Goods, the title to which is reserved to the Seller hereunder.
- 6.3 If the Purchaser has not received the proceeds of any sale of the Goods from any third party in accordance with clause 6.1(d), the Purchaser must if the Seller so requires, assign to the Seller the Purchaser's rights in respect of the recovery of the sale price.
- 7. LIEN**
- 7.1 The Seller retains a lien over any Vehicle until such time as the Purchaser makes payment in full for the Goods and Services.
- 7.2 If the Purchaser defaults in payment by the due date of any amount payable to the Seller, then the Seller may in its sole discretion sell any or all Vehicle that is subject to the lien, provided that the Seller shall pay to the Purchaser any surplus proceeds realized by it from a sale of any such item after discharging in full all monies outstanding to the Seller in respect of the Goods and Services and all reasonable costs incurred by the Seller in arranging and conducting such sale.
- 8. AUDIT**
- 8.1 The Purchaser must, on request, disclose to the Seller all relevant information regarding the sale or storage of the Goods by the Purchaser and the Purchaser agrees to give the Seller access at all reasonable times to any premises occupied by the Purchaser and permit the Seller to inspect the records relating to the sale of Goods.
- 8.2 The Purchaser must participate promptly and cooperatively in any audits conducted under this clause.
- 8.3 Each party shall bear their own costs of any audit.
- 9. RISK**
- 9.1 Vehicles are delivered to the Seller, or if requested, collected by the Seller from the Purchaser's premises at the Customer's own risk.
- 9.2 The risk in the Goods and all insurance responsibility for theft, loss, damage or deterioration in or to the Goods shall pass to the Purchaser immediately upon delivery of the Goods..
- 9.3 The Purchaser assumes all risk and liability for loss, damage or injury to persons or to property of the Purchaser, or third parties, arising out of the provision, need and use of the Services.
- 9.4 Until full payment in cleared funds is received by the Seller from the Purchaser, the Purchaser is responsible for the care, safe custody and control of the Goods and must insure the Goods. The Purchaser indemnifies the Seller against any loss or damage to the Goods howsoever arising whilst they are in the care of the Purchaser under this clause 9.
- 10. LICENCES**
- 10.1 If it is necessary
- (a) For the Purchaser to hold or obtain any License, the Purchaser is responsible to hold or obtain such License;
- (b) For the Seller to hold or obtain any License the Seller shall apply for it but if it is refused, the Agreement shall forthwith come to an end and neither the Seller nor the Purchaser shall be under any liability to the other in respect thereof.
- 11. DELIVERY**
- 11.1 Any period or date for delivery of the Goods or completion of the Services specified by the Seller is intended as an estimate only and is not a contractual commitment. The Seller will use its reasonable endeavor's to meet any estimated dates for delivery of the Goods or completion of the Services.
- 11.2 Delivery is deemed to occur:
- (a) Upon the Purchaser's collection of the Goods or any Vehicle from the Seller's premises, or
- (b) If the Seller has agreed to arrange transportation, upon dispatch of the Goods or any Vehicle from the Seller's premises.
- 11.3 If the Seller agrees to arrange for the transportation of the Goods or any Vehicle to the Purchaser, the Seller will make all reasonable efforts to do so within 7 days of notification that the Goods or any Vehicle are ready for delivery. The Seller will, at its discretion, designate the route and means of transportation for the delivery of the Goods or any Vehicle. The Purchaser authorizes the Seller to sub-contract delivery in its absolute discretion.
- 11.4 The Seller's delivery docket is prima facie proof of delivery of the Goods invoiced.
- 11.5 Unless otherwise agreed in writing, the Purchaser is responsible for all costs associated with delivery, including packing, freight, insurance and other charges arising from the point of dispatch of the Goods or any Vehicle to the point of delivery to the Customer.
- 11.6 The Purchaser shall accept delivery within fourteen (14) days after notification that the Goods are ready for collection, failing which the Goods shall be deemed to have been delivered upon the expiration of that period and shall be thereafter at the risk of the Purchaser, who shall pay the Seller upon demand for all storage and other costs incurred thereafter by the Seller in relation to the Goods.
- 11.7 The Purchaser indemnifies the Seller against any loss or damage suffered by the Seller, its sub-contractors or employees as a result of delivery, except where caused by the Seller's negligence.
- 12. LIABILITY**
- 12.1 Except as specifically set out in the Agreement, or contained in any warranty statement provided with the Goods, any Used Goods or the Services, any term, condition or warranty in respect of the quality, merchantability, fitness for purpose, condition, description, assembly, manufacture, design or performance of the Goods or Services, whether implied by statute, common law, trade usage, custom or otherwise, is hereby expressly excluded.
- 12.2 Used Goods are supplied "as is" without any warranties, express or implied, of any kind or nature, including, but not limited to, any warranties of performance or merchantability or fitness for a particular purpose.
- 12.3 The Seller's liability howsoever arising under or in connection with the sale, installation, use of, storage or any other dealings with the Goods or Services by the Purchaser or any third party is absolutely limited to:
- (a) the repair or replacement of the Goods;
- (b) the supply of equivalent Goods;
- (c) the re-supply of the Services.
- (d) the costs of having the Goods or Services re-supplied.
- 12.4 The Seller is not liable for any indirect or consequential losses or expenses suffered by the Purchaser 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.
- 12.5 The Seller is not liable for any loss or damage suffered where the Seller has failed to deliver Goods or Services or fails to meet any delivery date or cancels or suspends the supply of Goods or Services.
- 12.6 Nothing in the Terms is to be interpreted as excluding, restricting or modifying the application of any State or Federal Legislation which cannot be so excluded, restricted or modified.
- 13. FORCE MAJEURE**
- 13.1 The Seller will have no liability whatsoever under or in any way related to the sale and purchase of the Goods or Services or otherwise for any failure to fulfill any obligation under the Agreement to the extent that such fulfillment is prevented by circumstances beyond its reasonable control including but not limited to acts of God, strikes, lockouts, trade disputes, accident, fire, breakdowns, interruption of transport, government action, import or export restrictions, acts of terrorism, acts of war or any other cause whatsoever outside the Seller's control.
- 14. ACKNOWLEDGEMENTS**
- 14.1 The Purchaser acknowledges that:
- (a) it has not relied on any service involving skill and judgment, or on any advice, recommendation, information or assistance provided by the Seller in relation to the Goods or Services or their use or application.
- (b) it has the sole responsibility of satisfying itself that the Goods or Services are suitable for the Purchaser's use.
- (c) any description of the Goods or Services provided in a quotation or invoice is given by way of identification only and does not constitute a contract of sale by description.
- (d) the Seller has not made, and that no person acting on the Seller's behalf has made any representations or warranties about the Used Goods.

15. CANCELLATION

- 15.1 If through circumstances beyond the Seller's control it is unable to affect delivery or the Goods or Services, then the Seller may cancel the Purchaser's order (even if it has already been accepted) by written notice to the Purchaser.
- 15.2 No purported cancellation or suspension of an order or any part of it by the Purchaser is binding on the Seller after that order has been accepted.
- 15.3 If the Purchaser cancels its order after acceptance by the Seller, then the Seller will be entitled to damages for breach of contract.

16. WARRANTY

- 16.1 The Goods and Services provided by the Seller are subject to a specific warranty supplied with the Goods and Services and which is available upon request from the Seller:
- 16.2 The Seller will not be responsible for failure or defect in the Goods or Services resulting from:
- (a) Purchaser or operator abuse or neglect
 - (b) operation without adequate coolant, fuel or lubricants;
 - (c) over fueling; or over speeding;
 - (d) lack of maintenance or lubrication, coolant or air intake system;
 - (e) improper storage, starting, warm-up, run-in or shut-down practices.
 - (f) unauthorized or improper alterations, modifications or repairs conducted by the Purchaser or any third party;
 - (g) Failure to use and operate in accordance with any installation, maintenance and start-up instructions provided with the Goods or Services.
 - (h) Our goods come with a guarantee that cannot be excluded under the Australian Consumer law. You are entitled to a replacement or refund for a major failure and for compensation for any other reasonably foreseeable loss or damage. You are entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure.

17. RETURNS

- 17.1 Subject to clause 17.2, the Seller will not be liable for any defects, shortages, damage or non-compliance with the Agreement unless:
- (a) the Purchaser notifies the Seller within [3] days of delivery specifying the shortage or defect; and
 - (b) the Seller is given the opportunity to inspect the Goods and investigate the complaint before any further dealing.
- 17.2 If the Purchaser fails to give the notice as required in clause 17.1, the Purchaser will be deemed to have accepted the Goods and will be bound to pay for them.
- 17.3 When any claim for defects, shortages, damage or non-compliance is accepted by the Seller, the Seller may, at its option, repair the Goods, replace the Goods, re-supply the Services, or refund the cost of providing the Goods or Services.
- 17.4 The Seller will not under any circumstances accept goods for return that:
- (a) have not been stored, used or handled in accordance with the Seller's instructions or any legislative requirements;
 - (b) have been specifically imported, produced or acquired to fulfill any Agreement;
 - (c) have been altered in any way; or
 - (d) are not in their original condition or packaging.
- 17.5 The Purchaser must:
- (a) Obtain the Seller's prior written approval for return of any Goods; and
 - (b) Pay all freight charges associated with return of the Goods.
- 17.6 Exchange Core Policy – A credit for the amount of the deposit will be issued when that engine meets the following requirements:
- (a) No visible cracks or broken areas in the engine block, crankshaft, cylinder head (after head and crankshaft removal) or sump pan. The unit must be in serviceable condition.
 - (b) All similar parts supplied with the Seller's units must be on the worn engine exchanged. A cost charge will be debited for missing parts.

- (c) The worn engine (or other unit) must be identical to the make and model of the unit purchased, the deposit will not be refunded until it is established by inspection that the worn engine is the same make, model, capacity and/or construction as the Seller's unit supplied.
- (d) The worn engine (or other unit) must be assembled and complete within the cover or crate that the Seller's unit was supplied in and must be free from visible external damage. The sump oil must be removed.
- (e) The worn engine must be received within fourteen (14) days from date of purchase. The Seller may at its absolute discretion extend the period within which the deposit unit must be received or the deposit forfeited.

17.7 Damaged Core Policy – Penalty charges apply to the refund of the deposit in accordance with the following:

Engines

- (a) 80% of Deposit Value (minimum) if worn engine is not identical to the unit supplied and described on the purchase invoice - or is damaged beyond normal repair, e.g. hole in block, cracked or broken crankshaft, OR
- (b) 50% of Deposit Value (minimum) if worn engine has broken gearbox lug or similar damage, OR
- (c) 10% of Deposit Value (minimum) if worn engine has damage to sump or timing cover and/or is incomplete (missing components, e.g. rocker cover or side plates, etc) which were supplied with the Seller's unit.

Cylinder Heads

Full Deposit Value will only be refunded if the worn head is identical to the purchased unit supplied and does not show evidence of tampering.

Heads are not acceptable on exchange basis unless complete with assembled valves.

18 APPLICABLE LAWS

- 18.1 This Contract is governed by the laws of Victoria and the parties submit to the non-exclusive jurisdiction of the courts of Victoria.

19 NO WAIVER

- 19.1 Failure by the Seller to enforce any of these Terms will not operate or be construed as a waiver of any of the Seller's rights, powers or remedies.

20 SEVERABILITY

- 20.1 Any provision of any of these terms which is prohibited or unenforceable shall be ineffective to the extent of the prohibition or unenforceability but that will not invalidate the remaining provisions of these terms.

21 NOTICES

- 21.1 A notice must be in writing and handed personally or sent by email, fax or prepaid mail to the last known address of the addressee. Notices sent by prepaid post are deemed to be received upon posting. Notices sent by email or fax are deemed to be received upon the sender's machine confirming such transmission.