

# Terms and Conditions of Sale

Last updated September 2019

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Floveyor Pty Ltd (ABN 14 114 153 927) (**Floveyor**).

## 1. DEFINITIONS

### 1.1

In this Agreement unless inconsistent with the context or subject matter:

**"ACL"** means the Australian Consumer Law (as set out in Schedule 2 to the Competition and Consumer Act 2010 (Cth));

**"Agreement"** means:

- (a) these Terms and Conditions; and
- (b) all documents attached to these Terms and Conditions, including the warranty terms, key terms and quotation.

**"Claim"** means any claim, action, demand or proceeding however arising (including under contract, statute, common law or equity) in respect of any Loss or alleged Loss;

**"Client"** means the Client identified in this Agreement;

**"Client's Address for Service"** means the email address of the Client which the Client generally uses in communications with Floveyor;

**"Client Intellectual Property"** means Intellectual Property Rights subsisting in any material, information or data of any kind provided by the Client to Floveyor;

**"Confidential Information"** means information relating directly or indirectly to Floveyor, its assets and the operation and affairs of Floveyor, including without limitation, this Agreement and the Equipment;

**"Credit Application"** means a credit application, application for credit or similar agreement entered into by Floveyor and the Client pursuant to which Floveyor agrees to supply the Equipment to the Client on credit terms. The parties may or may not have entered into such an agreement;

**"Dry Commissioning"** means the Equipment has been manufactured, trial-fit, passed quality control testing, disassembled and packed ready for transport.

**"Equipment"** means any Equipment supplied by Floveyor to the Client from time to time including pursuant to a Purchase Order and includes any services that are supplied ancillary to the supply of the Equipment (such as the provision of instructions and commissioning);

**"Floveyor"** means Floveyor Pty Ltd ABN 14 114 153 927;

**"Floveyor's Address for Service"** means Email: [accounts@floveyor.com](mailto:accounts@floveyor.com);

**"Force Majeure"** means an act, omission or circumstance over which Floveyor could not reasonably have exercised control;

**"GST"** has the meaning given to it in the GST Act;

**"GST Act"** means the A New Tax System (Goods and Services Tax) Act 1999 (Cth);

**"Intellectual Property"** means Intellectual Property Rights, including patents, copyright, trademarks, any right to have Confidential Information kept confidential and any application or right to apply for registration of any of these rights, and includes the following:

- (a) the Equipment (including the specifications for the Equipment);
- (b) ideas, information, data, specifications and designs relating to or connected with the Equipment, including without limitation any drawings, documents, processes or manuals that Floveyor supplies to the Client in respect of the Equipment
- (c) books and records relating to or connected with the Equipment;
- (d) advices (including without limitation verbal advices) relating to or connected with the Equipment;
- (e) technical information, including trade secrets, plans, encryptions, codes and product descriptions and information relating to or connected with the Equipment;
- (f) any other material or information provided by Floveyor to the Client.

**"Intellectual Property Rights"** means all present and future rights conferred by law in or in relation to copyright, trademarks, designs, patents, circuit layouts, plant varieties, business and domain names, inventions and confidential information, and other results of intellectual activity in the industrial, commercial, scientific, literary or artistic fields whether or not registrable, registered or patentable. These rights include without limitation:

- (a) all rights in all applications to register those rights;
- (b) all renewals and extensions of those rights; and

- (c) all rights in the nature of those rights, such as moral rights;  
"Loss" includes (without limitation) the following, whether direct or indirect, special or consequential in nature:
- (a) loss, damage, costs (including legal costs on a solicitor and own client basis), action or expense of any kind; and
  - (b) anything referred to in the preceding subclauses relating to or arising out of or in connection with:
    - (i) personal injury (including death or disease) to the Client;
    - (ii) personal injury (including death or disease) to any third party; or
    - (iii) loss of or damage to the property of Floveyor, the Client or any third party; and
  - (iv) a breach or non-compliance by Floveyor or the Client with any law;

"Order Confirmation" means a formal order confirmation form issued by Floveyor pursuant to which a Purchase Order is accepted;

"Purchase Order" means a purchase order for Equipment placed by the Client with Floveyor and which is accepted by Floveyor in accordance with this Agreement.

1.2 In this Agreement unless inconsistent with the context or subject matter:

- (a) A reference to a person includes any other legal entity;
- (b) A reference to a legal entity includes a person;
- (c) Words importing the singular number include the plural number;
- (d) Words importing the plural number include the singular number;
- (e) A reference to a party includes the party's heirs, executors, successors and permitted assigns;
- (f) Clause headings are for reference purposes only and must not be used in interpretation;
- (g) Where any word or phrase is given a defined meaning any other part of speech or other grammatical form concerning the word or phrase has a corresponding meaning;
- (h) A reference to a statute includes all regulations and subordinate legislation and amendments;
- (i) References to writing include any mode of representing or reproducing words in tangible and permanently visible form, and includes e-mail;
- (j) A reference to a monetary amount is a reference to an Australian currency amount;
- (k) An obligation of two or more parties binds them jointly and each of them severally;
- (l) An obligation incurred in favour of two or more parties is enforceable by them severally;
- (m) Reference to time are to local time in Perth (AWST);
- (n) Where time is to be reckoned from a day or event, the day or event must be excluded, and reference to a month means a calendar month;
- (o) A reference to a business day means any day on which trading banks are open for business in Perth (AWST); and
- (p) If any time period specified in this Agreement expires on a day which is not a business day, the period shall expire at the end of the next business day.

## 2. PROVISION OF EQUIPMENT & SERVICES

2.1 Floveyor and the Client agree that Floveyor will provide the Equipment to the Client on the terms and conditions contained in this Agreement.

2.2 Each time the Client requires Floveyor to supply it with Equipment, the Client must submit a Purchase Order to Floveyor. Floveyor may accept or reject a Purchase Order in its discretion. Any accepted Purchase Orders shall form part of and be governed by the terms of this Agreement. Floveyor will accept a Purchase Order by issuing an Order Confirmation.

## 3. APPLICABLE TERMS

3.1 In the event of any inconsistency between this Agreement and:

- (a) an Order Confirmation, the terms contained in this Agreement shall apply to the extent of the inconsistency unless expressly stated otherwise in the Order Confirmation;
  - (b) a Credit Application, the terms contained in the Credit Application shall apply to the extent of the inconsistency.
- 3.2 The Client acknowledges and agrees that they must not attempt to include any terms and conditions within their Purchase Order. The Purchase Order must solely contain the details of the Equipment required and the quantity. In the event that the Client includes any such terms within their Purchase Order or otherwise sends terms and conditions to the Seller at any time, the parties acknowledge and agree that any such terms and conditions provided by the Client are not binding on Floveyor and do not form part of this Agreement, the Purchase Order or an Order Confirmation. This Agreement, the Order Confirmation and the Credit Application (if any) contains the entire agreement between the parties in respect of its subject matter.
- 4. PAYMENT**
- 4.1 All quotes are Free Carrier Floveyor Bayswater, WA, in Australian dollars and excluding GST and any other taxes, duties, customs and excise charges unless otherwise stated.
- 4.2 Payment terms for the Equipment is as set out in this Agreement. The Client must comply with those terms.
- 4.3 The Client will also pay to Floveyor, on demand, on a full indemnity basis, all amounts that Floveyor may, at its absolute discretion, expend or incur (including legal costs on a solicitor and own client basis) as a result of the Client defaulting on any of the terms of this Agreement.
- 4.4 If payment is not made in accordance with this clause 4, Floveyor at its entire discretion may require the Client to pay Floveyor interest on all outstanding monies from the due date until the date of payment at the rate of 15% per annum accruing daily, subject to change from time to time by written notice to the Client at the absolute discretion of Floveyor. The obligation to pay interest survives termination of this Agreement.
- 4.5 If payment is not made in accordance with this clause 4, Floveyor may:
  - (a) refuse to supply any further part of the Equipment, or any other Equipment or services (including without limitation in relation to spare parts) to the Client until all outstanding monies, including any accrued interest, is paid in full; or
  - (b) terminate this Agreement whereupon the full price for the Equipment then supplied, whether or not the time for payment under this Agreement has arrived, will be immediately due and payable.
- 4.6 The Client may not withhold payment or make any deduction from any amount owing without Floveyor's prior written consent, irrespective of any claim the Client may have against Floveyor for any thing or matter whether related to the provision of the Equipment or not.
- 4.7 Floveyor reserves the right to change the price for the Equipment if a variation to Floveyor's quotation is requested or if there has been delays in receiving instructions from the Client. Any variation from the plan of scheduled works or specifications (including, but not limited to, any variation as a result of additional works required due to unforeseen circumstances such as poor weather conditions, limitations to accessing the site, availability of machinery, safety considerations, prerequisite work by any third party not being completed or as a result of any increase to Floveyor's in the cost of materials and labour) will be charged for on the basis of Floveyor's quotation and will be shown as variations on the invoice. Further, if the Client supplies any further instructions/information to Floveyor following the date that Floveyor provides the Client with a quote for the Equipment then this may be deemed a variation for the purpose of this clause. Payment for all variations must be made in full within the earlier of seven days of being provided with an invoice for such variations or the date that the Equipment is supplied.
- 4.8 All prices quoted by Floveyor are the actual amounts payable to Floveyor free of all deductions and set off whatsoever and the Client will be responsible for all tariffs, taxes, import duties and all other charges and payments which may be levied,

charged or assessed or imposed in respect of the Equipment. The Client is responsible for all bank fees and charges and must ensure that Floveyor receives the entire amount payable in cleared funds without deduction.

4.9 All amounts paid by the Client to Floveyor are non-refundable to the extent permitted by law. This is because a Purchase Order being accepted, Floveyor will take steps to manufacture the Equipment and will commence incurring costs and Floveyor may also reject other orders placed by other customers on the basis that you have placed your Purchase Order.

4.10 It is the responsibility of the Client to ensure that payment is made into the correct bank account. With consideration to the increase in cyber fraud, the onus is on the Client to adequately verify any change of bank detail information received by email or other means prior to making payments to Floveyor. Any amounts paid into an incorrect bank account will remain due and payable.

## 5. WARRANTIES

5.1 The Client warrants to Floveyor that as at the date of this Agreement and for the duration of this Agreement:

- (a) it has the legal right and power to enter into this Agreement;
- (b) the execution, delivery and performance of this Agreement by the Client has been duly and validly authorised by all necessary corporate action on its part;
- (c) this Agreement is a valid and binding Agreement on the Client, enforceable in accordance with its terms;
- (d) the Client is not bankrupt or insolvent and no receiver, liquidator, administrator or receiver and manager has been appointed over any part of its assets and no such appointment has been threatened;
- (e) and no proceedings have been brought or threatened for the purpose of bankrupting or winding up the Client;
- (f) no partner, director or shareholder of the Client is bankrupt, a discharged bankrupt or in any form of receivership, administration or liquidation; and
- (g) it has the capacity to make the payment in accordance with this Agreement.

5.2 Floveyor provides a warranty in respect of the Equipment in accordance with the warranty statement contained in this Agreement. In the event that the Client is not the ultimate end user of the Equipment, the Client is solely responsible for ensuring that it provides copies and details of all instructions, including any user guides or manuals to the ultimate end user and that the end user complies with such instructions and does not undertake any act that voids the application of the warranty. The Client is responsible for ensuring that the end user only uses the Equipment for its intended purpose, and the Client acknowledges that any use of the Equipment for any application other than that which it was manufactured for may void the warranty provided by Floveyor. Any acts of the end user of the Equipment will be attributed to the Client. For the avoidance of doubt, the warranty provided by Floveyor is an agreement between Floveyor and the Client, and Floveyor is not obliged to deal directly with any third party end user in respect of any warranty claims.

## 6. CONFIDENTIAL INFORMATION

6.1 The Client acknowledges that the Client may become acquainted with or have access to Confidential Information and agrees to maintain the confidence of the Confidential Information and to prevent its unauthorised disclosure to or use by any other person, firm or company.

## 7. INTELLECTUAL PROPERTY

7.1 The Client grants to Floveyor a non-exclusive, transferable, royalty-free licence to use the Client Intellectual Property solely for the purpose of performing its obligations under this Agreement.

7.2 If any of the Client Intellectual Property becomes incorporated into the Equipment, the Client acknowledges and agrees that such Client Intellectual Property shall immediately on its incorporation become the property of Floveyor (however the warranties provided by the Client hereunder in respect of Client Intellectual Property shall continue to subsist).

- 7.3 Floveyor grants to the Client a perpetual, royalty free, non-transferable/non-assignable/non-sublicensable license of the Intellectual Property for the sole purpose of using the Equipment for its intended purpose.
- 7.4 The Client agrees that Floveyor will own all rights, title and interest (including Intellectual Property Rights) which subsist in or which may be obtained from the Intellectual Property and undertakes not to (and must ensure that its personnel and any third party to whom it supplies the Equipment to do not), except to the extent required to use the Equipment:
- (a) take or permit or omit any action which would or might invalidate or put in dispute Floveyor's title to the Intellectual Property or any part of it;
  - (b) oppose any application for registration or invalidate any registration of the Intellectual Property or any part of it (including without limitation a registration of the Intellectual Property as a patent worldwide);
  - (c) support any application to remove or undo Floveyor's title in the Intellectual Property or any part of it;
  - (d) assist any other person directly or indirectly in any of the above; or
  - (e) use, copy, reproduce, reverse engineer, distribute, export, adapt, alter, modify, translate, publish, share, create derivative works, or publicly display any of the Intellectual Property anywhere in the world, without the prior written consent of Floveyor.
- 7.5 The Client acknowledges and agrees that where it supplies or sells the Equipment to a third party (End User), the Client:
- (a) must ensure that the End User is made aware of and complies with this clause 7 as though the End User was named as the Client;
  - (b) acknowledges and agrees that all acts of the End User will be attributed to the Client, and the Client will be liable for any breach of this clause 7 by the End User as though the breach was committed by the Client personally; and
  - (c) if required by Floveyor, prior to providing the End User with the Equipment, must procure the End User to enter into an agreement with Floveyor pursuant to which the End User agrees to be bound by these terms as if they were named as the Client (however if Floveyor requires this then this shall in no way abrogate from the Client's obligations under this clause 7).
- 7.6 The Client grants Floveyor an irrevocable licence to use the Client's name and logo in Floveyor's marketing materials in respect of Floveyor's business, and Floveyor may publicly name the Client as a client and indicate broadly what Equipment were purchased by the Client. Floveyor agrees not to publish specific details of the Equipment that were purchased.
- 8. NO ASSIGNMENT**
- 8.1 The Client must not transfer or assign its rights under this Agreement to anyone else, without the prior written consent of Floveyor, which may be granted or withheld by Floveyor in its sole, absolute and unfettered discretion. The Client must provide any information Floveyor requires to consider whether to grant its consent.
- 8.2 Any change in 50% or more of the shareholding of the Client will constitute a deemed assignment which requires Floveyor's prior written consent in accordance with clause 8.1.
- 8.3 The Client acknowledges and agrees that Floveyor may transfer, assign or otherwise dispose of its interest in this Agreement upon giving written notice to the Client.
- 9. DELIVERY**
- 9.1 The Client is responsible for paying all costs associated with delivery of the Equipment. Unless otherwise stated in this Agreement, the Equipment shall be supplied to the Client FCA as per Incoterms 2010, from Floveyor's factory address stated in this Agreement.
- 10. OWNERSHIP AND ASSIGNMENT**
- 10.1 Notwithstanding anything to the contrary express or implied in this Agreement, the parties agree that Floveyor retains full title to the Equipment and title will not at any time pass to the Client until the purchase price for the Equipment and all other amounts owing in respect of the Equipment is paid to Floveyor notwithstanding:

- (a) the delivery or collection of the Equipment to/by the Client (as the case may be);
  - (b) installation in or attachment of the Equipment to the Client's property; and/or
  - (c) the possession and use of the Equipment by the Client.
- 10.2 Until title in the Equipment passes to the Client, Client acknowledges and agrees that:
- (a) it will not agree, attempt, offer or purport to sell, assign, sub-let, lend, pledge, mortgage, let, hire or otherwise part or attempt to part with personal possession of or otherwise deal with the Equipment without the express written consent of Floveyor;
  - (b) it is a bailee only of the Equipment and it will, if requested by Floveyor, return the Equipment to Floveyor following non-fulfilment of any obligation of the Client (including payment of monies) without limiting any other right Floveyor may have;
  - (c) it must maintain the Equipment in satisfactory condition and keep them insured on Floveyor's behalf for their full price against all risks with an insurer that is reasonably acceptable to Floveyor. The Client must obtain an endorsement of Floveyor's interest in the Equipment on its insurance policy and holds the benefit of the Customer's insurance of the Equipment on trust for Floveyor and must pay to Floveyor the proceeds of any insurance in the event of the Equipment being lost, damaged or destroyed;
  - (d) it will deliver up the Equipment to Floveyor upon demand by Floveyor and gives Floveyor and its agents and authorised representatives an irrevocable licence to enter any premises occupied by the Client and any premises where it believes any Equipment may be stored (without liability for trespass or any resulting damage) and to use the name of the Client and to act on its behalf, if necessary, to recover possession of the Equipment and agrees to indemnify Floveyor and its agents and/or authorised representatives from any damage, injury and/or loss arising from such recovery or attempted recovery of the Equipment from the Client's possession or control;
  - (e) it holds the proceeds, book debts and accounts receivable arising from selling or hiring of the Equipment on trust for and as agent for Floveyor immediately when they are receivable or are received; and
  - (f) Floveyor may recover as a debt due and immediately payable by the Client all amounts owing by the Client to Floveyor in any respect even though title to the Equipment has not passed to the Client.

## 11. RISK

- 11.1 Even if Floveyor retains ownership of the Equipment, all risk for the Equipment passes to the Client on delivery of the Equipment to Client or the nominee of the Client.
- 11.2 If any of the Equipment is damaged or destroyed following delivery but prior to ownership passing to the Client, Floveyor is entitled to:
- (a) receive payment for the Equipment; and
  - (b) receive all insurance proceeds payable for the Equipment. The production of these Credit Terms by Floveyor is sufficient evidence of Floveyor's rights to receive the insurance proceeds without the need for any person dealing with Floveyor to make further enquiries.
- 11.3 Where Floveyor is required to install the Equipment the Client warrants that the structure of the premises or equipment in or upon which these Equipment is to be installed or erected is sound and will sustain the installation and work incidental thereto and Floveyor shall not be liable for any Claims, demands, Losses, damages, costs and expenses howsoever caused or arising in connection with the installation and work incidental thereto.
- 11.4 Where the Client is to supply Floveyor with any design specifications (including, but not limited to CAD drawings) the Client shall be responsible for providing accurate data. Floveyor shall not be liable whatsoever for any errors in the Equipment that are caused by incorrect or inaccurate data being supplied by the Client.

**12. ACL**

- 12.1 The Client warrants and represents to Floveyor that the Equipment will be used by the Client in trade or commerce, as part of a manufacturing process. As such, the parties acknowledge that the mandatory warranties contained in the ACL do not apply to this Agreement.

**13. TERMINATION**

- 13.1 Floveyor may in its absolute discretion, by written notice to the Client, immediately terminate this Agreement and/or one or more Purchase Orders (and shall have no liability for any Loss suffered by the Client due to the termination):
- (a) if the Client fails to make payment in accordance with clause 4;
  - (b) if the Client becomes insolvent;
  - (c) if the Client commits an act of bankruptcy or is made bankrupt;
  - (d) if the Client makes a composition or other arrangement with creditors;
  - (e) if the Client assigns assets for the benefit of creditors generally;
  - (f) being a company, if the Client enters into a deed of company arrangement or has a controller, administrator, receiver or receiver and manager appointed;
  - (g) being a company, if the Client goes into liquidation;
  - (h) being a partnership, if the Client has a receiver or a receiver and manager appointed;
  - (i) in the event of Force Majeure (such as if there are issues with Floveyor's supplier and Floveyor is unable to supply the agreed Equipment); or
  - (j) breaches any warranty or obligation contained in this Agreement or a Purchase Order and fails to rectify the breach within 7 days of being given a notice to do so.

- 13.2 Upon termination of this Agreement, all existing Purchase Orders shall automatically terminate. The Client shall be liable to pay to Floveyor for all Equipment supplied by Floveyor as well as for all Equipment which Floveyor has commenced manufacturing but has not yet supplied under a Purchase Order up until the date of termination, and such amounts shall be a debt immediately due and owing. A certificate by Floveyor stating the amount payable by the Client under this clause is conclusive evidence of the amount payable in the absence of manifest error.

- 13.3 The rights and remedies of the parties contained in this clause 13 are in addition to any other rights and remedies by law, in equity or under this Agreement.

**14. INDEMNITY**

- 14.1 Except to the extent caused or contributed to by the negligent act or omission, wilful misconduct or breach of this Agreement by Floveyor, the Client indemnifies Floveyor against any Losses, liabilities, costs, charges or expenses (including any direct, indirect, special or consequential losses) and all interest, penalties and legal costs (calculated on a full indemnity basis) and all other professional costs and expenses suffered or incurred by Floveyor arising out of or in connection with:
- (a) the Client's breach or negligent performance or non-performance of this Agreement;
  - (b) the enforcement of this Agreement;
  - (c) any Claim made against Floveyor for actual or alleged infringement of a third party's intellectual property rights arising out of or in connection with the use by Floveyor of any materials, information, specifications or data of any kind provided to it by the Client (provided they are used for their intended purpose by Floveyor); or
  - (d) any Claim made against Floveyor by a third party for death, personal injury or damage to property arising out of or in connection with defective Equipment, to the extent that the defect in the Equipment is attributable to the acts or omissions of the Client, its employees, agents or subcontractors or is not covered by the warranty in this Agreement.
- 14.2 The Client must make payments under this provision:
- (a) in full without set-off or counterclaim, and without any deduction in respect of taxes unless prohibited by law; and



- (b) in the currency in which the payment is due, and otherwise in Australian dollars, in immediately available funds.
- 14.3 The indemnities in this clause:
  - (a) are continuing obligations of the Client, independent from its other obligations under this Agreement and survive termination or expiry of this Agreement; and
  - (b) are absolute and unconditional and unaffected by anything which otherwise might have the effect of prejudicing, releasing, discharging or affecting the liability of the Client.
- 15. GENERAL**
- 15.1 Any notice required to be given in accordance with this Agreement is deemed to be sufficiently given if provided to the Client's Address for Service or Floveyor's Address for Service (as the case may be) and, if it is:
  - (a) delivered by hand, upon which the time of giving notice will be the time of delivery;
  - (b) sent by pre-paid post, upon which the time of giving notice will be two (2) business days after the date of postage;
  - (c) sent by email, upon which the time of giving notice will be the time shown on the email generated by the sending machine identifying proof of transmission to the designated email address.
- 15.2 The following will constitute proof of receipt:
  - (a) if sent by registered post, proof of posting by registered post;
  - (b) if sent by email, proof of sending.
- 15.3 This Agreement is governed by the laws of Western Australia and the Commonwealth of Australia which are in force in Western Australia.
- 15.4 The parties submit to the jurisdiction of the Courts of Western Australia, relevant Federal Courts and Courts competent to hear appeals from them.
- 15.5 This Agreement contains the entire understanding and agreement between the parties as to the subject matter of this Agreement.
- 15.6 All previous negotiations, understandings, representations, warranties, memoranda or commitments about the subject matter of this Agreement are merged in this Agreement and are of no further effect.
- 15.7 No oral explanation or information provided by a party to another affects the meaning or interpretation of this Agreement or constitutes any collateral agreement, warranty or understanding.
- 15.8 No waiver or amendment of a provision of this Agreement is binding unless made in writing and signed by both parties.
- 15.9 The parties must execute and deliver all documents and must do all things as are necessary for the complete performance of their respective obligations under this Agreement.
- 15.10 If a provision of this Agreement is void or unenforceable it must be severed from this Agreement and the provisions that are not void or unenforceable are unaffected by the severance.
- 15.11 The rights and remedies of a party to this Agreement are in addition to the rights or remedies conferred on the party at law or in equity.
- 15.12 This Agreement may be executed in any number of counterparts and when executed communication of the fact of execution to the other parties may be made by sending evidence of execution by electronic communications including email.
- 15.13 Where this Agreement is executed for a party by an attorney, the attorney by executing it declares that the attorney has no notice of revocation of the power of attorney.
- 15.14 The contra proferentem rule and other rules of construction will not apply to disadvantage a party whether that party put the clause forward, was responsible for drafting all or part of it or would otherwise benefit from it.
- 15.15 Time is in all cases and in every respect of the essence of this Agreement.