

1. DEFINITIONS AND INTERPRETATION

1.1. In this Agreement:

ACL means the Australian Consumer Law Schedule of the *Competition and Consumer Act 2010* (Cth) and its associated Regulations as amended;

Agreement means any agreement for the provision of services by Kaishan to the Customer in accordance with a compressor service contract under these Terms;

Business Day means Monday to Friday in the Victoria, Australia, excluding public holidays;

Confidential Information means:

- (a) a Party's business and financial information, sales and supply details, marketing strategies, customer and supplier listings, business listings, databases, and information concerning the Party's customers or business associates;
- (b) any and all other information of a Party which, by its nature, places or potentially places that Party at an advantage over its present or future business competitors; and
- (c) any information of a Party that would otherwise at law be considered secret or confidential;

whether or not marked confidential, but does not include information which:

- (d) at the time of first disclosure by a Discloser to the Recipient is already in the public domain; or
- (e) after disclosure by a Discloser to the Recipient, becomes part of the public domain otherwise than by disclosure in breach of this Agreement; and
- (f) the Recipient can prove that the information was in its possession before the time of the first disclosure by the Discloser;

consumer is as defined in the ACL and in determining if the Customer is a consumer, the determination is made if Customer is a consumer under the Agreement;

Customer means the person, jointly and severally if more than one, entering into a compressor service contract with Kaishan;

Discloser means a Party who discloses Confidential Information to the other Party;

equipment means the equipment the subject of the services, except where the context requires otherwise;

Force Majeure Event means an event beyond the reasonable control of the Parties including blockage, civil commotion, unavoidable accident, trade restriction, war, epidemic, pandemic, or any action or restriction imposed by any government or statutory body that delays or prevents a Party's compliance with a relevant obligation;

GST means the Goods and Services tax as defined in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and its associated Regulations as amended;

Intellectual Property means:

- (a) Kaishan's Confidential Information;
- (b) Kaishan's designs, diagrams, directions, drawings, instructions, manuals, materials, prototypes and specifications of any and all kinds relating to Kaishan, or any of its goods, procedures, processes or services; and
- (c) all current copyright, design rights, know how, patent rights and trademark rights owned by or licensed to Kaishan and in the future, and in any improvement, modification or variation;

Kaishan means Kaishan Australia Pty Ltd (ACN 114 574 515), trading as Kaishan Australia;

Party means a party to this Agreement, and **Parties** means both of them;

Recipient means a Party who receives Confidential Information from the other Party;

services means the services provided by Kaishan to the Customer in accordance with and relating to the parties compressor service contract;

Site means the Customer's site that Kaishan is to provide the services to the Customer; and

Terms means these Service Proposal Terms and Conditions.

2. BASIS OF AGREEMENT

2.1. These Terms are the only express terms, conditions and warranties upon and subject to which compressor service contracts will be entered into by Kaishan with the Customer.

2.2. Unless otherwise agreed in writing by an Authorised Person, the Terms of this Agreement cannot be varied or replaced by any other terms or conditions.

2.3. The Agreement shall include any terms and conditions set out in or accompanying Kaishan's tender or quotation and, in the event of any inconsistency, the terms and conditions set out in or accompanying Kaishan's tender or quotation shall prevail.

2.4. Kaishan may vary or amend these Terms by written notice to the Customer at any time. Any variations or amendments will apply to quotes or services provided after the notice date.

3. TERMS OF PAYMENT

3.1. Unless otherwise agreed in writing:

- (a) subject to 3.1(b), full payment for the services must be made within 30 days of the date of Kaishan's invoice.
- (b) Kaishan reserves the right to require payment in full on completion of the services.

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

3.3. Payment terms may be revoked or amended at Kaishan's discretion immediately upon giving the Customer written notice. Subject to clause 3.1, any amendments to payment terms will apply to quotes or services provided after the notice date.

3.4. The time for payment is of the essence.

4. PAYMENT DEFAULT

- 4.1. If the Customer defaults in payment by the due date of any amount payable to Kaishan, then all money which would become payable by the Customer to Kaishan at a later date on any account, becomes immediately due and payable without the requirement of any notice to the Customer, and Kaishan may, without prejudice to any of its other accrued or contingent rights:
- (a) charge the Customer interest on any sum due at the prevailing rate pursuant to the Penalty Interest Rates Act 1983 (Vic) plus 4% for the period from the due date until the date of payment in full;
 - (b) charge the Customer for, and the Customer must indemnify Kaishan from, all costs and expenses (including without limitation all legal costs and expenses) incurred by it resulting from the default or in taking action to enforce compliance with the Agreement or to recover any goods;
 - (c) cease or suspend supply of any further goods or services to the Customer;
 - (d) by written notice to the Customer, terminate any uncompleted contract with the Customer.
- 4.2. Subject to any applicable statutory stay of proceedings, and without prejudice to Kaishan's other remedies at law, clauses 4.1(c) and 4.1(d) may also be relied upon, at Kaishan's option:
- 4.3. where the Customer is a natural person 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
- 4.4. 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, administrator, receiver or manager or similar functionary appointed in respect of its assets, 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. PRICING AND PRICE ADJUSTMENT**
- 5.1. Prices quoted for the supply of services include GST and any other taxes or duties imposed on or in relation to the services.
- 5.2. The price quoted may be subject to renegotiation in the event of any change to the machine operational conditions as specified in the 'Customer Equipment Details' schedule. Where there is any change in the costs incurred by Kaishan in relation to the machine operational conditions or services, Kaishan may seek to vary its price to take account of any such change by notifying the Customer and the Customer may:
- (a) accept the new price and continue with the Agreement; or
 - (b) refuse the new price and cancel the Agreement insofar as it relates to the subject of the requested variation.
- 5.3. If the Customer requests any variation to the Agreement, Kaishan may increase the price to account for the variation by giving notice to the Customer, and the Customer may:
- (a) accept the new price and continue with the Agreement; or
 - (b) refuse the new price and cancel the Agreement insofar as it relates to the subject of the requested variation.
- 5.4. The price per twelve (12) month period is based on a "Scope of Work" schedule and is subject to adjustment by Kaishan on completion of each twelve (12) months from the commencement date (hereinafter referred to as the **Review Date**).
- 5.5. The adjustment in the Agreement price at each Review Date is based on the variation during the preceding 12 month period of the published Consumer Price Index (CPI), and in exchange rates as applicable to imported parts if such variation exceeds 5%.
- 6. QUOTATION VALIDITY**
- 6.1. Any quotation provided by Kaishan to the Customer for the proposed supply of services is:
- (a) valid for 30 days;
 - (b) an invitation to treat only; and
 - (c) only valid if in writing.
- 6.2. An Agreement is accepted by Kaishan when Kaishan accepts, in writing or electronic means, an offer from the Customer or provides the Customer with the services.
- 6.3. Kaishan may refuse to accept any offer.
- 6.4. The Customer must provide Kaishan with its specific requirements, if any, in relation to the services.
- 7. RESPONSIBILITIES OF KAISHAN**
- 7.1. Kaishan will provide the number of scheduled service calls to the Customer's Site as per "Frequency of schedule services" to carry out the routine maintenance and condition monitoring of the machine specified in the "Scope of Work" schedule.
- 7.2. Kaishan will inspect and maintain the equipment in accordance with Manufacturer's Machine Instruction book(s).
- 7.3. Kaishan will provide all labour, spare parts and consumables deemed applicable to the items and services nominated in the "Scope of Work" schedule, and subject to the exclusions outlined in clause 9.
- 7.4. Kaishan will provide a copy of the "Site and Service Reports" at the conclusion of each scheduled service call. The Site and Service Reports outline the service provided and any additional repairs recommended. The Site and Service Reports must be signed by representatives of both parties at the conclusion of each scheduled service call thereby verifying the work, as specified, has been completed.
- 7.5. Scheduled service calls provided outside of the agreed service time, at the Customers request,

will be covered by an additional charge to the Customer.

8. RESPONSIBILITIES OF CUSTOMER

- 8.1. The Customer must perform daily and weekly inspection on the machine(s) as indicated in the Manufacturer's Machine Instruction book(s), and must ensure:
- (a) only lubricants approved by Kaishan are used.
 - (b) water in the cooling circuits (if appropriate) is within the limits of quality, quantity and temperature as specified by Kaishan.
 - (c) adequate ventilation is available in the vicinity of the equipment
- 8.2. The Customer must advise Kaishan immediately of any changes to operation or Site conditions and any malfunctions or failures that may influence the proper functioning of the equipment.
- 8.3. The Customer must allow Kaishan to have free and full access to the equipment during normal working hours to perform scheduled service calls pursuant to this Agreement, unless otherwise specified. The cost of waiting time, where required by the Customers operational conditions, will be covered by an additional charge to the Customer as per clause 9.1
- 8.4. The Customer is responsible for taking the necessary action on repairs recommended by Kaishan.

9. EXCLUSIONS

- 9.1. The Customer will bear the cost of maintenance arising from the following:
- (a) damage to the equipment caused by incorrect operation;
 - (b) damage to the equipment caused by external forces, ie falls, collisions etc;
 - (c) damage to the equipment due to introduced contamination, or adverse environmental conditions.
 - (d) failure of the equipment due to lack of Customer daily/weekly maintenance and/or failure to inform Kaishan of equipment faults and continued operations with the same;
 - (e) failure due to unavailability of the equipment to Kaishan for scheduled service calls as and when required;
 - (f) waiting time due to the Customer operating requirements; and
 - (g) the Customer's failure to comply with repairs recommended by Kaishan.

10. PERFORMANCE OF AGREEMENT

- 10.1. Any period or date for the provision of services stated by Kaishan is an estimate only and not a contractual commitment.
- 10.2. Kaishan will use its reasonable endeavours to meet any estimated dates for the provision of the services but will not be liable for any loss or damage suffered by the Customer or any third party for failure to meet any estimated date.

- 10.3. If Kaishan cannot complete the services by any estimated date, it will complete the services within a reasonable time.

11. TERMINATION AND CONTRACT TERM

- 11.1. The Parties may, by agreement, terminate this Agreement at any time and upon such terms as agreed.
- 11.2. Either Party may terminate this Agreement by providing the other Party with sixty (60) days written notice.
- 11.3. This Agreement may also be terminated by Kaishan with immediate effect by Kaishan giving written notice of termination to the Customer if the Customer:
- (a) commits a breach of this Agreement and fails to remedy such breach within 14 days of receipt of notice in writing to do so; or
 - (b) subject to any applicable statutory stay of proceedings, becomes insolvent or is made subject to an application for winding up, resolves to wind up voluntarily (other than for the purposes of a solvent reconstruction), has a receiver (or similar functionary) or an administrator appointed in respect of any of its assets, ceases to carry on business, or enters into a composition or arrangement with its creditors generally.
- 11.4. Upon termination of this Agreement, whether as a result of a mutual agreement between the parties or by reasons of the Customer defaulting as aforesaid or otherwise, the Customer shall pay to Kaishan a sum equal to the difference of services and parts provided under normal conditions and prices and the value of the instalments already paid to the date of termination (if the instalments are less than the value of actual services and parts at normal prices).
- 11.5. Termination of this Agreement does not relieve a Party of a liability to the other Party in respect of the rights or remedies of the other Party which have accrued prior to termination.
- 11.6. On termination of this Agreement for whatever reason the Recipient must, as soon as reasonably practical, return to the Discloser all of the Discloser's Confidential Information in the Recipient's control or possession, or otherwise deal with such Confidential Information in accordance with any reasonable direction given by the Discloser.
- 11.7. The term of this Agreement is as per quotation acceptance page. Depending on the services provided, there may be an additional charge according to clause 11.4 should the contract be terminated within the contract term.

12. LIABILITY

- 12.1. Except as the Terms specifically state, or as contained in any express warranty provided in relation to the goods or services, the Agreement does not include by implication any other term, condition or warranty in respect of the quality,

merchantability, acceptability, fitness for purpose, condition, description, application, manufacture, design or performance of the goods or services or any contractual remedy for their failure.

- 12.2. If the Customer is a consumer nothing in these Terms restricts, limits or modifies the Customer's rights or remedies against Kaishan for failure of a statutory guarantee under the ACL.
- 12.3. If the Customer is a consumer, Kaishan's liability is limited, to the extent permitted by law, at the election and discretion of Kaishan to:
 - (a) the resupply of the services; or
 - (b) refund the cost of the services.
- 12.4. If clauses 12.2 or 12.3 do not apply, then other than as stated in the Terms or any written warranty statement Kaishan is not liable to the Customer in any way arising under or in connection with the sale, transport, handling, use of, application, storage or any other dealings with the goods or services by the Customer or any third party.
- 12.5. Kaishan 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, except to the extent of any liability imposed by the ACL.
- 12.6. To the maximum extent permitted at law, Kaishan's liability to the customer is limited to the resupply of the services or payment of the cost of having the services resupplied.
- 12.7. The Customer acknowledges that:
 - (a) it has not relied on any service involving skill and judgement, or on any advice, recommendation, information or assistance provided by Kaishan in relation to the goods or services or their use or application.
 - (b) it has not made known, either expressly or by implication, to Kaishan any purpose for which it requires the goods or services and it has the sole responsibility of satisfying itself that the goods or services are suitable for the use of the Customer.
- 12.8. Nothing in the 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 supply of services which cannot be excluded, restricted or modified.
- 12.9. The Customer indemnifies and keeps Kaishan harmless in respect of any claims, costs, demands, expenses and losses of whatever nature arising as a result of a breach of this Agreement by the Customer.

13. DAMAGES TO BE REDUCED EQUITABLY

- 13.1. In any claim, suit or action against Kaishan connected with any supply of equipment or services by Kaishan to the Customer or any dealings between Kaishan and the Customer, whether a claim, suit or action for breach of contract, negligence or otherwise, any damages

recoverable must be reduced, to the extent that is lawful, just and equitable, having regard to relevant acts or omissions of the Customer, its servants or agents.

14. ENVIRONMENTAL DISCLAIMER

- 14.1. The Environmental Management at any site on which Kaishan equipment is used is the responsibility of the Customer. In this regard Kaishan disclaims any responsibility for any infringement which occurs related to Acts, Rules or Regulations pertaining to environmental pollution aspects such as noise, atmospheric, water, sewer, dangerous goods, waste disposal etc.

15. EXCLUSION OF OTHER TERMS

- 15.1. The above terms and conditions shall apply to all contracts given by Kaishan to the exclusion of any other terms and conditions contained in any document submitted to the customer to the extent that such last-mentioned terms and conditions are inconsistent therewith or with any rights of Kaishan expressed or implied by law. No modification thereof shall be binding upon the parties hereto or either of them unless such modifications shall be in writing duly executed by the Customer and approved by Kaishan.

16. FORCE MAJEURE

- 16.1. Neither Party is liable for any delay in or failure of performance if:
 - (a) such delay or failure arises from a Force Majeure Event;
 - (b) the Party required to perform the relevant obligation has taken all proper precautions, due care and reasonable alternative measures to avoid the delay or failure and to carry out its obligation; and
 - (c) as soon as possible after the beginning of a Force Majeure Event which affects the ability of that Party to observe or perform any of its obligations under this Agreement, it has given notice to the other Party of the specific nature of the Force Majeure Event and, as fair as possible, an estimate of its duration.
- 16.2. A Party claiming the benefit of this clause 16 must use all reasonable endeavours to promptly overcome the effects of the Force Majeure Event in question.
- 16.3. This clause 16 does not apply to excuse either Party from any obligation to pay money.

17. GOVERNING LAW AND JURISDICTION

- 17.1. The law of the State of Victoria, Australia, from time to time governs this Agreement.
- 17.2. The Parties agree to the non-exclusive jurisdiction of the courts of Victoria, the Federal Court of Australia, and courts entitled to hear appeals from those courts.

18. AMENDING THIS AGREEMENT

- 18.1. Unless otherwise allowed under the terms of this Agreement, any amendment or change to the

terms of this Agreement is only effective once it is made in writing and executed by both Parties.

19. PARTIES MUST DO WHAT IS NECESSARY

- 19.1. Each Party must do whatever is necessary to give full effect to this Agreement including, where necessary, the carrying out of an act or the execution of a document.
- 19.2. If a Party does not do whatever is necessary to give full effect to this Agreement after being requested to do so, that Party irrevocably appoints the other Party as its attorney and in its name to do all things necessary (including execution of documents) to give full effect to this Agreement.

20. ASSIGNMENT

- 20.1. Unless otherwise agreed in writing, neither Party may assign any obligations or rights under this Agreement without the prior, written consent of the other Party.

21. NOTICES

- 21.1. Any notice given by a Party to the other Party under the terms of this Agreement must be in writing, in English, and sent to the other party by way of email, facsimile or certified or registered mail.
- 21.2. A notice given on a day which is not a Business Day is treated as given on the next Business Day.

22. SEVERABILITY

- 22.1. If a provision (or part of it) of this Agreement is held to be unenforceable or invalid, then it must be interpreted as narrowly as necessary to allow it to be enforceable or valid.
- 22.2. If a provision (or part of it) of this Agreement is held to be unenforceable or invalid and cannot be interpreted as narrowly as necessary to allow it to be enforceable or valid, then the provision (or part of it) must be severed from this Agreement and the remaining provisions are (or remaining part of the provision is) valid and enforceable.

23. WAIVER

- 23.1. A Party may exercise its rights at any time, and does not waive those rights even if that Party:
 - (a) previously waived a breach or default of all or part of the same or other provision of the Agreement; or
 - (b) delayed or omitted to exercise its rights.
- 23.2. A waiver is only effective:
 - (a) if it is signed by the Party granting the waiver; and
 - (b) to the extent set out in the waiver.

24. DISCLAIMER OF PARTNERSHIP

- 24.1. Nothing in this Agreement is to imply or constitute a partnership, joint venture or employment relationship between the Parties.
- 24.2. Unless otherwise expressly agreed by the Parties, neither Party has the authority or right to assume, create or incur any commitment, liability or obligation of any kind against, or in the name of, or on behalf of, any other Party except as expressly provided in this Agreement.