

TERMS AND CONDITIONS

CONTRACT OF DRY HIRE OF PLANT AND EQUIPMENT

1. Definitions and Interpretations

- 1.1 Unless otherwise required by the context or subject matter:
“Agreement” means these terms and conditions, the Schedule and the execution pages;
“Dry Hire” means the hire of the Plant and Equipment to the Hirer without an operator provided by the Owner;
“Due Date for Payment” means, unless otherwise specified, fourteen (14) days from:
(i) the date of invoice;
(ii) the day of expiry of the Term; or
(iii) delivery or attempted delivery of the Plant and Equipment, as the case may be
“Event of Default” means an event specified in clause 11 of this Agreement;
“Fee” means the hire fees specified in the Schedule or such other rate specified and quoted by the Owner from time to time;
“Force Majeure” means:
(a) Act of God;
(b) outbreak of hostilities, riot, civil disturbance, acts of terrorism;
(c) the act of any government or authority (including refusal or revocation of any licence or consent) where the said act is not a result of some neglect or default on the part of the relevant party;
(d) fire, explosion, flood, fog or bad weather;
(e) power failure, failure of telecommunications lines, failure or breakdown of plant and equipment, machinery or vehicles;
(f) default of suppliers or independent contractors;
(g) theft or malicious damage;
(h) strike, lockout or industrial action of any kind; and
(i) any cause or circumstance whatsoever (except financial difficulties or lack of funds) beyond the reasonable control of the relevant party;
“Hire Site” means the premises from which the Owner trades from or such other premises as notified to the Hirer in writing from time to time;
“Hirer” means the party specified in the Schedule and includes any party claiming through, under or in trust for the Hirer;
“Hirer’s Covenants” means the covenants, agreements and obligations contained or implied in this Agreement or imposed by law to be observed and performed by the Hirer;
“Job Site” means the site where the Hirer requires the Plant and Equipment to be used from time to time;
“Owner” means Debin Pty Ltd (ACN 009 325 124) trading as Freo Machinery of 1 Mandurah Road, Kwinana, Western Australia and includes its employees, agents or any sub-contractors and their employees;
“Plant and Equipment” means the goods specified in the Schedule and includes but is not limited to any item of plant, machinery or vehicle, and any tools, accessories, parts, items of equipment and devices affixed to or supplied with such plant, equipment, machinery or vehicle let by the Owner to a hirer; and
“Term” means the term of this Agreement specified in the schedule or such further period as is agreed by the Owner in writing.

- 1.2 Unless otherwise required by the context or subject matter, a reference to a party includes that party’s executors, administrators, personal representatives, successors and assigns. If a party comprises 2 or more persons, a reference to a party includes the executors, administrators, personal representatives, successors and assigns of each of those persons.

- 1.3 If a party comprises 2 or more persons, the covenants and agreements bind and must be performed by each of them jointly and severally and may be enforced against any one or any 2 or more of them.

2. Hire

The Hirer offers to take the Plant and Equipment on Dry Hire for the Term on the terms and conditions of this Agreement.

3. Payment of Hire Fees

- 3.1 The Hirer shall pay the Owner the Fee strictly in accordance with the manner specified in the Schedule without any right of set-off or deduction on the Due Date for Payment.

- 3.2 The Hirer shall pay any sales, rental or other taxes, stamp duty, import duties, bonds or any other charges which may be levied upon this Agreement and/or the use or delivery of the Plant and Equipment.

- 3.3 The Hirer shall pay the Owner interest at the rate of twenty percent (20%) per annum on any money due to be paid under this Agreement which remains unpaid calculated from the Due Date for Payment to the date of actual payment.

3.4 Transportation, erection and dismantling

- (a) Unless otherwise specified, transportation costs to and from the Job Site and the Hire Site, including the supply of additional labour, equipment, materials and transportation expenses and other requirements are at the cost of the Hirer.
(b) Unless otherwise specified, the Hirer is responsible for the supply of all necessary craneage, labour and other handling equipment to offload, assemble, erect, dismantle and load the Plant and Equipment at the Job Site.

4. Operation, maintenance and storage of Plant and Equipment

- 4.1 The Hirer shall at the Hirer’s expense keep and maintain the Plant and Equipment in proper working order and good and substantial repair, including but not limited to lift studies and job safety analysis, lubricating, refuelling, daily servicing, running repairs, making mechanical, structural and electrical repairs, and where necessary replacing tyres and other wearing parts.

- 4.2 The Hirer must, in operating the Plant and Equipment, employ only persons who are properly trained and competent, and certified by Worksafe, or any successor organization if applicable, and holders of an appropriate driver’s licence and use recognised standards efficiently for the purpose for which the Plant and Equipment were intended at the date of its acquisition by the Owner.

- 4.3 The Hirer shall operate, maintain and store the Plant and Equipment with due care and diligence and in compliance with the instructions and recommendations of the supplier and manufacturer of the Plant and Equipment as to their operation, maintenance and storage or in accordance with any specific instructions of the Owner.

- 4.4 The Hirer must not, without the prior consent of the Owner, make any alterations, additions or replacements to the Plant and Equipment.
- 4.5 The Hirer must:
- (a) comply with all relevant laws, regulations, rules and by-laws governing or relating to the registration or licensing of the Plant and Equipment, and to its use and operation;
 - (b) not do or cause or suffer to be done any act, matter or thing which is likely to endanger the safety or condition of the Plant and Equipment;
 - (c) pay to the Owner on demand all money which the Owner pays or is liable to pay to make good any failure by the Hirer to comply with any obligation under this Agreement and all other costs and expenses, including legal costs and expenses that the Owner may incur in the enforcement or protection or attempted enforcement or protection of the Owner's rights under this Agreement or in the Plant and Equipment, including money paid by the Owner in releasing any lien or other encumbrance claimed on the Plant and Equipment and in dismantling and removing the Plant and Equipment from any premises;
 - (d) notify the Owner of any accident resulting in injury to persons or damage to property (including damage to the Plant and Equipment) involving the Plant and Equipment within seven (7) days of the date of the accident;
 - (e) not remove the Plant and Equipment from the State of Western Australia without the prior written consent of the Owner; and
 - (f) to secure the Plant and Equipment when not in use and to ensure that all reasonable measures are taken to protect the Plant and Equipment against acts of theft and vandalism.
- 4.6 The Hirer must effect insurance and maintain any such insurance with an insurer approved by the Owner in the names of the Owner and the Hirer for their respective rights and interests whilst the Plant and Equipment is at the Job Site or in transit between the Job Site and Hire Site in respect of the following:
- (a) the Plant and Equipment for the full insurable value against such risk as the Owner may nominate or, in the absence of such nomination, against loss or damage by fire, theft, accident and such other risks as are insured against by prudent persons engaged in a similar business to that of the Hirer excluding liability for claims being the subject of compulsory third party bodily injury insurance on vehicles registered by the Owner;
 - (b) a policy of employers' indemnity insurance including workers' compensation insurance in respect of all employees of the Hirer in respect of damage or loss caused by the use, maintenance, repair or storage of the Plant and Equipment; and
 - (c) public risk liability and product defect liability, and any other such insurance in support of the indemnities contained in this Agreement, and must in respect of any such policy of insurance, deliver to the Owner a copy of the policy and promptly pay all premiums and stamp duty payable in respect of the policy.
- 4.7 Each of the Owner and the Hirer is entitled to receive payments of money under the insurance policy effected pursuant to this clause according to its interest in the policy. Each party agrees to assist and co-operate with the other in making, pursuing and settling any claim made under the policy.
- 4.8 Without limiting the generality of clause 4.7 and if the Owner requests, the Hirer will expend all money received by it under the policy in respect to damage to the Plant and Equipment in restoring or replacing the Plant and Equipment to its condition prior to the commencement of this Agreement subject to reasonable wear and tear, and if such money is insufficient the Hirer will make good the deficiency at its own cost.
5. **Retention of Title, Liens and Encumbrances**
- 5.1 The Hirer must not and must not attempt to assign, mortgage, pledge, sell, charge, encumber, sublet, part with possession of, grant any lien, licence or other encumbrance over, or otherwise dispose of or deal with, or permit or suffer to exist any lien or other encumbrance over, the Plant and Equipment or any part of them or any of the rights of the Hirer to the Plant and Equipment or any of the rights of the Hirer under this Agreement, and must keep the Plant and Equipment free from any distress, execution or other legal process.
- 5.2 Nothing contained in this Agreement renders on the Hirer any right or property or interest in the Plant and Equipment other than as a hirer.
- 5.3 The Hirer must notify contractors, mechanics and the like on the Plant and Equipment of the existence of the restriction on the creation of liens or similar interests, whether by way of pledge or otherwise in or over the Plant and Equipment, and will notify any persons seizing the Plant and Equipment or any part thereof of the restrictions contained in this clause 5.
6. **Risk**
- The Hirer shall assume all risks and liabilities for and in respect of the Plant and Equipment and for injuries to or death of persons and damage to property howsoever arising from the possession, use, maintenance, repair or storage of the Plant and Equipment.
7. **No Reliance or Warranties**
- 7.1 The Hirer acknowledges and agrees that:
- (a) the Hirer has satisfied itself as to the condition and suitability of the Plant and Equipment and their fitness for the Hirer's purposes; and
 - (b) the Hirer has, prior to signing this Agreement, examined the Plant and Equipment and satisfied itself as to its compliance with the specifications and the validity of the warranties of the manufacturer or supplier.
- 7.2 All conditions and warranties, express or implied, whether arising by statute or otherwise, as to the condition, suitability, quality, fitness for any purpose or safety of or title to the Plant and Equipment are hereby negated and excluded to the full extent permitted by the law, and the Owner gives no such warranty or condition and the Hirer acknowledges that the Owner has not given any such warranty or condition.
- 7.3 The terms in this Agreement that exclude or limit the Owner's liability shall apply only to the extent permitted by law, and subject to the provisions of the *Trade Practices Act 1974* and other statutes from time to time in force which cannot be excluded, restricted or modified or which can only be excluded, restricted or modified to a limited extent, and if any such statutes apply to this Agreement, then to the extent to which the Owner is entitled to do so, the Owner's liability under such statutes shall be limited at the Owner's absolute option to:
- (a) the replacement of the Plant and Equipment or the supply of Plant and Equipment similar to the Plant and Equipment; or
 - (b) the payment of the cost of having the Plant and Equipment repaired; or
 - (c) the repair of the Plant and Equipment.

7.4 The Hirer acknowledges and agrees that the Owner is not liable:

(a) to the Hirer for any loss or damage or delay through breakdown, mechanical defect or accident to or of the Plant and Equipment;

(b) to any person for any loss or damage to any property stolen from the Plant and Equipment or damaged or otherwise lost during the Dry Hire of the Plant and Equipment or left in the Plant and Equipment after the return of the Plant and Equipment to the Hire Site; and

(c) to the Hirer for any form of breakdown whether mechanical, electrical or structural to the Plant and Equipment while on Dry Hire.

8. **Hirer's Covenants and Warranties**

8.1 The Hirer covenants and agrees that:

(a) the Hirer must not do or omit to do any act or thing which might in any way invalidate or prejudice any insurance effected by the Owner or Hirer in respect of the Plant and Equipment;

(b) notwithstanding whether the Owner or Hirer has effected insurance in respect of the risks, the Hirer INDEMNIFIES AND WILL KEEP INDEMNIFIED the Owner against:

(i) the loss of or damage to the Plant and Equipment whether by fire, theft, accident, seizure, confiscation or otherwise; and

(ii) all other losses, damages, claims, penalties, liabilities and expenses, including legal costs, howsoever arising incurred as a result of or in connection with the Plant and Equipment or the possession, use, maintenance, repair or storage of the Plant and Equipment or the seizure or the taking of possession of the Plant and Equipment by the Owner.

8.2 The Hirer warrants and represents to the Owner that:

(a) the Hirer, being a body corporate, is duly incorporated and validly existing under the *Corporations Act*, and has full power and authority to enter into and observe and perform the terms of this Agreement, or the Hirer, being an individual, has full power and capacity to enter into and observe and perform the terms of this Agreement;

(b) this Agreement constitutes legal, valid and binding obligations enforceable against the Hirer in accordance with its terms;

(c) all consents and approvals, whether governmental or otherwise, required in order for the Hirer to observe and perform the Hirer's Covenants have been obtained and are in full force and effect;

(d) no Event of Default exists and no event has occurred or is continuing to occur which constitutes or might, with the passing of time or giving of notice, or both, constitute an Event of Default; and

(e) to the best of the Hirer's knowledge, information and belief, no information supplied by the Hirer to the Owner in relation to this Agreement contained any material misstatement of fact or omitted to state a material fact.

9. **Access to Plant and Equipment**

The Owner has at all time free access to the Plant and Equipment and may examine and/or test the same at the discretion of the Owner following reasonable notice to the Hirer.

10. **Force Majeure**

If a party becomes unable wholly or in part by Force Majeure to carry out any of its duties or obligations under this Agreement:

(a) that party must give to the other party prompt written notice of:

(i) detailed particulars of the Force Majeure;

(ii) so far as is known, the probable extent to which the party will be unable to perform or will be delayed in performing the duty or obligation;

(b) the relevant duty or obligation, so far as it is affected by the Force Majeure, will be suspended during the continuance of the Force Majeure; and

(c) the party will use all reasonable efforts to overcome or remove the Force Majeure as quickly as possible.

11. **Default and Termination**

11.1 An Event of Default occurs if:

(a) any money payable under this Agreement is not paid on the Due Date for Payment;

(b) the Hirer fails to observe and perform any of the Hirer's Covenants, other than a failure to pay money, and such failure continues for more than 3 days after the Owner has given the Hirer notice requiring the Hirer to remedy the breach;

(c) the Owner ascertains that any warranty, representation or statement made by the Hirer under or in connection with this Agreement has been false in any material respect;

(d) the Hirer, being an individual, commits an act of bankruptcy, is declared mentally ill or is convicted of a criminal offence or dies;

(e) a receiver, or an agent in possession for a mortgagee is appointed in respect of any property of the Hirer;

(f) a mortgagee takes possession of any property of the Hirer;

(g) any execution or similar process is made against the property of the Hirer;

(h) an application is made, a resolution is passed or a meeting is convened for the purpose of considering a resolution for the Hirer to be wound up unless the winding up is for the purpose of reconstruction or amalgamation;

(i) a compromise or arrangement is made between the Hirer and its creditors;

(j) a resolution is passed, or a meeting is convened for the purpose of considering a resolution for the Hirer to be placed under official management;

(k) the Hirer admits in writing its inability to pay its debts;

(l) an application is made to a court for an order summoning a meeting of any class of creditors of the Hirer;

(m) an application is made or notice given or other procedure commenced for the dissolution or cancellation of the registration of the Hirer under the *Corporations Act* or any similar process; or

(n) an investigation is commenced under section 13 of the *Australian Securities Commission Act* to investigate the affairs of the Hirer.

- 11.2 On the occurrence of an Event of Default, the Owner may take possession of the Plant and Equipment with or without notice to the Hirer, and the Hirer must at the Hirer's expense immediately on demand deliver the Plant and Equipment in good order and repair in accordance with the directions of the Owner, and in default, the Hirer irrevocably authorises the Owner to enter any premises occupied or controlled or believed by the Owner to be occupied or controlled by the Hirer and repossess the Plant and Equipment, and for such purposes, break open any gate or lock and dismantle the Plant and Equipment from any part of the premises to which they may be affixed, and the Hirer indemnifies the Owner in respect of any loss arising from any act done under or by virtue of this subclause.
- 11.3 Upon termination of this Agreement following the occurrence of an Event of Default, the Hirer must pay to the Owner by way of liquidated damages, in addition to and without prejudice to any other right or remedy of the Owner, an amount equal to the total of:
- (a) the unpaid balance of the Fee for the Term which would have been payable until the expiration of the Term had the Agreement not been terminated;
- (b) the Owner's costs and expenses incurred in repossessing and storing, insuring and registering the Plant and Equipment and in entering on and removing the Plant and Equipment from land or premises on which the Plant and Equipment was situated, and make good any injury or damage caused to the land or premises;
- (c) the Owner's costs and expenses of repairs reasonably necessary to bring the Plant and Equipment to a saleable condition; and
- (d) interest calculated in accordance with clause 3.3 of this Agreement.
- 11.4 **Condition of Plant and Equipment – Surveys**
- (a) Immediately prior to the commencement of this Agreement, the Plant and Equipment will be inspected by a representative of each party to establish the general condition thereof and a statement of condition of the Plant and Equipment will be prepared ("the On Hire Survey").
- (b) As soon as practicable following termination of this Agreement, the Plant and Equipment will be inspected by a representative of each party to establish the general condition thereof and a statement of condition of the Plant and Equipment will be prepared ("the Off Hire Survey").
- (c) The Hirer acknowledges and agrees that it will, at its cost, reinstate the Plant and Equipment to its condition as specified in the On Hire Survey.
- 11.5 On or before termination of this Agreement, the Hirer shall return the Plant and Equipment to the Hire Site and the Hirer acknowledges and agrees that the Fee is payable:
- (a) until such time the Plant and Equipment is returned to the Hire Site and returned to its condition as specified in the On Hire Survey; and/or
- (b) for the entirety of the Term notwithstanding that the Plant and Equipment may be returned to the Owner prior to termination.
12. **Option to extend hire period**
- If and only if no later than one (1) month before the expiry of the Term, the Hirer gives notice to the Owner requesting an extension of the Term such extension is, if any, subject to the Owner's agreement, the availability of the Plant and Equipment and the following conditions:
- (a) the Fee and all other payments due under this Agreement having been received by the Owner in full as at the expiry of the Term;
- (b) there is no breach of the Hirer's Covenants; the Term shall be extended for the hire period specified in the Schedule commencing on the day following the date of expiration of the Term and at the Fee, as varied, also specified in the Schedule on the same terms and conditions of this Agreement except for the insertion of the extended term.
13. **Subrogation**
- The Hirer agrees to assist and co-operate with the Owner in relation to the Owner exercising any and all of its rights in respect to the Plant and Equipment, including without limitation the Owner instituting, carrying on and enforcing, compromising or completing any legal proceedings which the Owner thinks desirable to protect its rights in respect of the Plant and Equipment.
14. **Miscellaneous**
- 14.1 A notice or demand given or made to any person under this Agreement must be in writing, may be served by delivering it to that person personally or addressing it to that person and leaving it or posting it by pre-paid or certified post to the address of that person appearing in this Agreement or any other address nominated by that person by notice to the person giving the notice, and will be deemed to be given or made in the case of personal delivery, when delivered, and in the case of service by leaving the notice at an address specified above, when left at that address, and in the case of service by post, on the second business day following the date of posting.
- 14.2 The Hirer irrevocably authorises the Owner and each of the authorised officers of the Owner to do on behalf of the Hirer all such things as the Hirer shall at any time be obliged to do under or by virtue of this Agreement and which the Hirer has neglected or refused to do, and the Hirer agrees to ratify all acts and things done by the Owner pursuant to this clause, and the Hirer indemnifies the Owner against all losses arising from any act done under or by virtue of this clause.
- 14.3 This Agreement is governed by, and to be interpreted in accordance with, the laws of Western Australia and where applicable the laws of the Commonwealth of Australia.
- 14.4 If any part of this Agreement is, or becomes void or unenforceable, that part is or will be, severed from this Agreement to the intent that all parts that are not, or do not become, void or unenforceable remain in full force and effect and are unaffected by that severance.
- 14.5 (i) Failure to exercise or delay in exercising any right, power or privilege in this Agreement by a party does not operate as a waiver of that right, power or privilege.
- (ii) A single or partial exercise of any right, power or privilege does not preclude any other or further exercise of that right, power or privilege, or the exercise of any other right, power or privilege.
- 14.6 This Agreement is binding on each party who executes it notwithstanding the failure of any other person named as a party to execute it, and the avoidance or unenforceability of any part of this Agreement.
- 14.7 Each party must execute and do all acts and things necessary or desirable to implement and give full effect to the provisions and purpose of this Agreement.
- 14.8 This Agreement constitutes the entire agreement between the parties and contains all the representations, warranties, covenants and agreements of the parties in relation to the subject matter of this Agreement.
- 14.9 Time shall be of the essence in relation to the terms of this Agreement.