

# **Progressive Equipment Limited Terms and Conditions of Trade**

The following terms and conditions (Terms and Conditions of Trade) apply to all purchases of Products and Services from PEL and any credit facilities PEL provides to the Customer.

## **1. Definitions**

- 1.1 "Credit Account Application" means the PEL credit account application form for a PEL Account.
- 1.2 "Customer" means the customer, any person acting on behalf of and with the authority of the Customer, or any person purchasing products and services from PEL.
- 1.3 "Delivery Point" means any address specified by the Customer when placing an Order or any address otherwise notified to PEL by the Customer and agreed to by PEL.
- 1.4 "Guarantor" means each guarantor named in the Credit Account Application and any other person or entity who gives a guarantee to PEL, and where the context permits, includes any agent, contractor, director, employees or representative of the Guarantor.
- 1.5 "Invoice" means an invoice issued by PEL to the Customer for each Order.
- 1.6 "Order" means any request by the Customer to purchase Products or Services from PEL.
- 1.7 "PEL" means Progressive Equipment Limited, or any agents or employees thereof.
- 1.8 "PEL Account" means any credit account created in accordance with these Terms and Conditions of Trade.
- 1.9 "PPSA" means the Personal Property Securities Act 1999.
- 1.10 "Price" means the amount advised to the Customer by PEL in New Zealand dollars, plus Goods and Services Tax (if any) and disbursements (if any).
- 1.11 "Products" means:
- a. all products, goods or materials supplied by PEL to the Customer; and
  - b. all of the Customer's present after acquired products, goods or materials that PEL has performed work on, or to which products, goods or materials supplied by PEL, have been attached or incorporated.
- 1.12 "Services" means all services provided by PEL to the Customer and shall include, without limitation, the design and supply of manufactured products and metal processing services and all advice and services charged for labour, hire charges, insurance charges, or any fee or charge associated with the supply of services.

## **2. The Contract**

- 2.1 These Terms and Conditions of Trade are deemed to be accepted by the Customer by agreement in writing, by the Customer's use of a PEL Account, or by purchasing Products or Services from PEL. Each transaction will form a legal contract between the Customer and PEL.
- 2.2 At all times the Customer's transactions with PEL are governed by these Terms and Conditions of Trade or the then current Terms and Conditions of Trade as varied by PEL from time to time.
- 2.3 Acceptance of these Terms and Conditions of Trade, including any updated terms, does not release, limit or adversely affect any prior personal guarantee or security given.
- 2.4 PEL consents to the Customer's acceptance and signature being received in electronic form. The person who accepts PEL's Terms and Conditions of Trade electronically warrants that they have authority to accept them on behalf of the Customer.
- 2.5 The Customer consents to receiving disclosure, notices and other communications from PEL in electronic form.

## **3. Orders**

- 3.1 All Orders for Products and Services are subject to acceptance by PEL. PEL is under no obligation to accept any of the Customer's Orders.
- 3.2 Any Order accepted PEL will be on these Terms and Conditions of Trade only.
- 3.3 A purchase order to PEL for Goods and Products is not required, unless the Customer specifically supplies one.
- 3.4 Once an Order is accepted by PEL an Invoice will be issued to the Customer.

## **4. Payment**

- 4.1 If the Customer has a PEL Account, the Price must be paid, in cleared funds, no later than the 20<sup>th</sup> of the month following the date of the Invoice.
- 4.2 If the Customer is not a PEL Account Holder the Price must be paid by the date stated in the Invoice.
- 4.3 The Customer may not deduct or withhold any amount (whether by way of set-off, counterclaim or otherwise) from any money owing to PEL.
- 4.4 If full payment is not made to PEL, by the due date for payment, PEL may (without affecting any other rights PEL may have) require the Customer to pay default interest, at the rate of 2.5% per month, compounding on the 20<sup>th</sup> of the month. Default interest will accrue on a daily basis, from the due date, until the date when payment is actually made, and shall be due on demand.
- 4.5 The Customer will be liable to pay all expenses and costs (including legal costs, as between solicitor and client) in connection with PEL recovering or attempting to recover any overdue amount.

## **5. Delivery**

- 5.1 If the Customer does not pick up the Products, on request, PEL will arrange the delivery of the Products to the Customer to the Delivery Point.
- 5.2 The Customer must pay all delivery and insurance charges (if any) relating to the Order.
- 5.3 PEL will not, in any event, be liable for any late delivery.
- 5.4 Delivery will be made or will be deemed to have been made, when the Products are picked up by the Customer or when the Products arrive at the Delivery Point.
- 5.5 All claims for Products damaged in transit, must be made within 7 days of delivery.

## **6. Risk and Ownership**

- 6.1 The Products will be at the Customer's risk, immediately on pick-up or delivery.
- 6.2 Legal and beneficial ownership of the Products will remain with PEL until all sums the Customer owes to PEL are paid in full in clear funds, even if the Customer incorporate the Products.
- 6.3 Until legal and beneficial ownership of the Products has passed to the Customer, the Customer will store the Products separately from other goods.
- 6.4 If the Customer wishes to sell any Products, before ownership of them has passed, the Customer may do only do so if the sale is genuine and made in the ordinary course of the Customer's business. The Customer must then promptly account to PEL for the proceeds of the sale, and hold the proceeds in trust for PEL until payment.

- 6.5 The Customer acknowledges that these Terms and Conditions of Trade create a security interest as defined in the PPSA in favour of PEL in any Products and any proceeds of Products and any existing or future rights to Products and that PEL may at any time register a financing statement of the Personal Property Securities Register to protect its security interest in the Products.
- 6.6 The Customer will not permit any third party security interest to subsist in relation to the Products.
- 6.7 The Customer will not change its name or other details without notifying PEL in writing at least 14 days before such change takes effect.
- 6.8 While PEL retains ownership of the Products that are in the Customer's possession or under the Customer's control, the Customer must properly store and secure the Products and insure the Products for their full replacement value until the Products are sold or consumed in the Customer's ordinary course of business.
- 7. Security**
- 7.1 The Customer and each Guarantor hereby charge in favour of PEL all of their present and after-acquired property on the terms contained in the latest Auckland District Law Society General Security Agreement.
- 7.2 The Customer and each Guarantor hereby mortgage in favour of PEL all interests in land they own (whether now or in the future). The mortgage terms will be those contained in the Auckland District Law Society All Obligations Mortgage form.
- 7.3 The Customer and each Guarantor hereby irrevocably appoint PEL and its directors (jointly and severally) to be their attorney to sign in their name and on their behalf any document to effect registration of a mortgage against the title to any land.
- 7.4 The securities granted in this clause shall secure all obligations owed to PEL from time to time, presently or in the future.
- 7.5 Nothing in sections 114(1)(a), 120, 122, 133 or 134 of the PPSA applies. The Customer and Guarantor waive any rights under sections 114(1)(a), 116, 120(2), 121, 125, 129, 131, 133, 134 and 148 of the PPSA.
- 7.6 The Customer and Guarantor waive their rights to receive a copy of any verification statement or any financing charge statement relating to any security interest created by these Terms and Conditions of Trade.
- 8. Specifications**
- 8.1 These Terms and Conditions of Trade are entered into by PEL, solely on the basis of information, specifications and instructions, given by the Customer to PEL, and PEL is not deemed to have any other information, specifications or instructions, concerning the requirements of the Customer.
- 8.2 In particular, the Products are designed and manufactured by PEL, in accordance with the statutory, regulatory, governmental and/or industry and/or environmental requirements, controls, standards or practices notified by the Customer to PEL, in writing.
- 8.3 If such information or instructions are insufficient or inaccurate, or if such requirements, controls, standards or practices should alter, after the date of signing of the Customer's Credit Account Application or the Order being accepted by PEL, PEL shall have the right to increase the Price.
- 9. Consumer Guarantees Act 1993**
- 9.1 When the Customer purchases Products or Services from PEL for business purposes then the guarantees and rights expressed or implied in the Consumer Guarantees Act 1993 in the Customer's favour do not apply to those Products or Services.
- 10. Warranties**
- 10.1 All warranties, conditions or obligations imposed on PEL by statute at law, in equity or otherwise are expressly excluded except to the extent that PEL cannot exclude them.
- 10.2 PEL gives no representations or warranties as to the quality or condition of the Products or Services or that the Products are fit for purpose.
- 10.3 The Customer represents and warrants to PEL that:
- all information provided by the Customer is true and correct and there is no information that has not been disclosed to PEL that would make any information untrue, inaccurate or misleading.
  - if the Customer is a company, it can satisfy the solvency test in accordance with section 4 of the Companies Act 1993.
- 11. Liability**
- 11.1 It is agreed that PEL will not be liable to the Customer, whether in contract, tort (including negligence), strict liability or by virtue of the breach of any statutory duty or otherwise.
- 11.2 Without limiting in any way, the extent of the general exclusion, set out in clause 11.1, it is agreed that PEL will not be liable to the Customer for:
- any damage or loss sustained by the Customer;
  - consequential indirect or special damage or loss of any kind (including loss of profits) sustained by the Customer, whether as a result of a breach of any contract in existence between the parties, faulty materials or workmanship of PEL, failure to achieve technical performance or specifications in respect of the Products, accidents, or failure to complete or deliver the Products, within the time stipulated, or any other cause whatsoever;
  - repairs made or attempted to be made to the Products by the Customer or its employees or agents, without the written permission of PEL and any consequences arising, as a result of such repairs;
  - corrosion of any metal component of the Product during PEL's manufacturing process or in the course of, or as a consequence of, the Customer's operation of the Products;
  - fair wear and tear of the Products;
  - the cost of normal maintenance, lubrication and adjustments to the Products;
  - loss or damage to the Products, arising directly or indirectly, from war or civil disturbances; and/or
  - failure to deliver by a specific date
- 11.3 In the event, notwithstanding the provisions of this clause 8, it is determined by any New Zealand Court, that PEL is liable to the Customer, whether in contract, tort (including negligence), strict liability or by virtue of the breach of any statutory duty or otherwise, then it is agreed that the total liability of PEL, in respect of all claims, that the Customer or any third party may make against PEL, will be limited to the Price.
- 11.4 The Customer and PEL agree that sections 9, 12A, 13 and 14(1) of the Fair Trading Act 1986 are contracted out of where the Customer is in trade and the Products and Services are acquired by the Customer in trade.
- 12. Indemnity**
- 12.1 The Customer shall indemnify PEL against any loss, damage or expense (including costs as between solicitor and client) suffered or incurred, as a result of any breach by the Customer of these conditions, or in recovering any moneys due by the Customer, or in exercising PEL's rights, under these Terms and Conditions of Trade and such loss, damage or expense, shall be moneys due for the purposes of these conditions.
- 13. Default and Termination**
- 13.1 The Customer is in default if:
- any payment is overdue;
  - in PEL's opinion the Customer is unlikely to be able to pay its due debts;
  - the Customer is a body corporate and it goes into liquidation, receivership, voluntary administration or makes, or is likely to make an arrangement with its creditors;

- d. the Customer is an individual and becomes bankrupt; and/or
  - e. the Customer breaches any term of these Terms and Conditions of Trade or is in default of any of the terms.
- 13.2 If the Customer is in default :
- a. PEL may cancel all or any Orders;
  - b. all amounts payable (whether due for payment or not) will become immediately payable;
  - c. PEL can enter premises where the Products are located (or it believes them to be located) and take possession of or remove them while it remains the owner (regardless of s109 of the PPSA);
  - d. PEL may reclaim any Products in the Customer's possession or control and deal with them for PEL's benefit; and
  - e. The Customer will be liable for all costs (including legal costs on a solicitor-client basis) and damages incurred as a result of the default.
- 13.3. If any Orders that PEL has accepted are unable to be fulfilled, PEL will notify the Customer and refund the Customer all valid payments. PEL shall not be liable for any loss or damage whatever, arising from such termination.
- 14. Dispute Resolution**
- 14.1 If a dispute between the parties cannot be resolved after good faith discussions, the Customer irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of New Zealand.
- 15. Severance**
- 15.1 If any provision or part of these Terms and Conditions of Trade is deemed to be invalid, unenforceable or illegal the remaining provisions will remain in full force and effect.
- 16. Use of Information and Privacy**
- 16.1 PEL will collect, retain, use and disclose the Customer's personal information in accordance with the Privacy Act 1993.
- 16.2 The Customer irrevocably authorises PEL to collect, retain and use any information about the Customer for the purpose of:
- a. providing Products and Services to the Customer;
  - b. communicating with third parties who provide services to PEL. This may include mailing houses, call centres, gateway providers, delivery service providers and organisations that assist PEL to check for or prevent unauthorized or fraudulent transactions;
  - c. communicating with credit reporting agencies for credit checking and credit reporting. This may include the disclosure, sharing and exchanging of personal information with other customers of a credit reporting agency. It will also be used to update and maintain credit information files and will be accessed by customers of the credit reporting agencies; and
  - d. marketing to any other party, any Products and Services provided by PEL
- 16.3 The Customer authorises PEL to disclose any information obtained to any person for the purposes set out above.
- 16.4 If the Customer is a natural person, the authorities under clauses 2 and 3 are consents for the purposes of the Privacy Act 1993.
- 16.5 The Customer warrants that all credit information supplied by the Customer, to PEL is accurate, complete, up-to-date and in all respects true and correct.
- 17. Waiver & Remedies**
- 17.1 If PEL delays or does not exercise any of its rights or remedies under these Terms and Conditions of Trade or otherwise at law, that will not be a waiver of the right or remedy and will be without prejudice to any rights PEL has.
- 17.2 Any waiver or consent that PEL gives to the Customer must be in writing and will be effective only in the specific instance and for the specific purpose for which it is given.
- 18. Assignment**
- 18.1 The Customer will not transfer or assign its rights, powers or obligations without PEL's written consent. For the purpose of this clause a change in the effective management or control of the Customer will be deemed as an assignment.
- 18.2 PEL and its successors and assigns may in its absolute discretion, without the consent or notice to the Customer, transfer or assign its rights or obligations under these Terms of Conditions of Trade to any other person or entity.
- 19. Force Majeure**
- 19.1 PEL will not be in breach of these Terms and Conditions of Trade and will not be liable to the Customer for costs or delays attributable in whole or part to action by any government or governmental agency or other external agency or event, including, without limitation, natural disaster or emergency, industrial action, civil disorder, equipment failure, banking or computer system disruption or interruption of power supplies or essential services or any other event out of PEL's control.
- 20. Entire Agreement**
- 20.1 Subject to any other agreement entered into between the Customer and PEL, these Terms and Conditions of Trade constitute the entire agreement and understanding between the parties and supersedes all prior discussions and agreements covering the subject matter of these Terms and Conditions of Trade
- 20.2 These Terms and Conditions of Trade apply notwithstanding any provision to the contrary expressed or implied in any of the Customer's terms of trade or other documents.
- 21. Governing Law**
- 21.1 These Terms and Conditions of Trade will be governed by New Zealand law and the Customer and any Guarantor agrees to submit to the non-exclusive jurisdiction of the New Zealand Courts.
- 21.2 The application of the United Nations Convention on Contracts for the International Sale of Goods is expressly excluded.