



# **TERMS AND CONDITIONS**

**Polaris Marine Trust No 1 ABN 84 343 204 460**

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**Polaris Marine Pty Limited**

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<b>Contents</b>	<b>page</b>
1. Definitions	1
2. Interpretation	2
3. Terms	2
4. Customer's Warranties and Undertakings	2
5. Company's Liability	3
6. Subcontracting and Himalaya Clause	5
7. Deviation and Time	5
8. Conditions of Towage	6
9. Company's Charges and Lien	6
10. Title and Security	7
11. GST	9
12. Interest, Costs and no right of set-off	9
13. Customer Insolvency	9
14. Company May Terminate, Suspend or Cancel Any Part of This Contract	10
15. Notice of Loss and Time Bar	10
16. Conditions and Severability	10
17. Competition and Consumer Act	10
18. Law and Jurisdiction	11

# TERMS AND CONDITIONS

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## 1. Definitions

In these Conditions:

**Goods** means anything carried by the Company together with any container, packaging, pallet(s) or any other storing device in, on or with which the cargo are to be carried and/or stored, whether or not supplied by or on behalf of the Customer;

**Company** means Polaris Marine Pty Limited ACN 147 809 667, its servants or agents;

**Conditions** mean these Terms and Conditions of the Company;

**Customer** means the person with whom this contract is made or who otherwise becomes bound by these Conditions;

**Customer Property** means anything supplied by or on behalf of the Customer used in relation to Services or Goods or with Equipment.

**Equipment** means anything supplied by or on behalf of the Company including but not limited to tug boats, lighters, cranes (including floating cranes), floating plant, work vessels, hopper barges and any other vessels, moorings, bins and plant or machinery of whatsoever nature.

**Items** means the original items supplied and also includes proceeds and Commingled Property when the context permits. The Items will include 'other goods' as classified under the PPSA;

**Hague-Visby Rules** means the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading done at Brussels on 25 August 1924, as amended by the amending Protocol done at Brussels on 23 February 1968 (Visby Protocol) and as further amended by the Protocol, done at Brussels on 21 December 1979 (SDR Protocol).

**Paid** means receipt of cash or cleared funds by the Company in full satisfaction of the Amounts Owing;

**PPSA** means the Personal Property Securities Act 2009 (Cth) and any regulations made pursuant to it. The following words have the respective meanings given to them in the PPSA: account, ADI account, commingled, control, proceeds, purchase money security interest, register, registration, security interest and verification statement.

**Services** means all services supplied by the Company to the Customer including but not limited to the use, supply, hiring, installation, maintenance or inspection of Equipment, carriage and storage of Goods, salvage, wreck removal, towage, supply of floating plant for events, lighterage, construction, diving services, hiring and cartage of Equipment, construction and emptying of waste from bins and sale of Items;

**Subcontractor** means any person, their servants or agents, who, pursuant to a contract or arrangement with any other person (whether or not the Company), provides or agrees to provide the Services or any part of the Services and includes subcontractors of the Subcontractor;

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## **2. Interpretation**

In this agreement, unless the context otherwise requires:

(a) Headings

The headings of the various sections and clauses of these Conditions are for convenience of reference only and shall not modify, define, expand or limit any of the terms or provisions of these Conditions.

(b) Plurals, Genders and Persons

The singular includes the plural and vice versa. Words importing one gender include every gender. A reference to a person includes a corporation and vice versa.

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## **3. Terms**

- 3.1 All Services are provided to the Customer subject only to these Conditions, which shall prevail at all times over any term and conditions of the Customer. Where the Company issues any bill of lading, waybill, consignment note, charter party, or other transport document (Transport Document) which contains or incorporates any terms, that Transport Document shall form part of these Conditions.
- 3.2 In the event of and to the extent of any inconsistency between these Conditions and a Transport Document, , these Conditions shall prevail to the extent of any inconsistency.
- 3.3 The Company shall not be bound by any agreement purporting to waive or vary these Conditions unless such agreement to so waive or vary shall be in writing and signed by an executive of the Company and shall have been entered into prior to the commencement of the Services or provision of Items.
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## **4. Customer's Warranties and Undertakings**

- 4.1 The Customer warrants that it is either the owner or the authorised agent of the person owning or having an interest in any Goods or Customer Property and enters into this contract on its own behalf or as authorised agent of that person. The Customer will only be deemed to have entered into this contract as agent if the identity of the Customer's principal is disclosed to the Company in writing prior to the Customer and the Company entering into this contract.
- 4.2 The Customer warrants that no claim or allegation will be made against the Company by any person (other than the Customer or the Customer's disclosed principal) who is or may
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subsequently be interested in the Goods or part of it in relation to the Services and the Customer undertakes to indemnify the Company in respect of any liability whatsoever and howsoever arising (including but not limited to liability arising from negligence or breach of contract, whether fundamental or otherwise, or wilful act or default of the Company or others) in respect of any such claim or allegation.

- 4.3 The Customer warrants that it has complied with all laws and regulations relating to the nature, condition, packaging, handling, storage and carriage of the Goods. Further, the Customer shall provide to the Company all such assistance, information and documentation that may be necessary to enable the Company to comply with such laws and regulations.
- 4.4 The Customer warrants that the Goods are packed to withstand the ordinary risks of handling, storage and carriage, having regard to their nature.
- 4.5 The Customer warrants that it will comply with all laws and regulations relating to the use, storage and handling of the Equipment during the period of hire.
- 4.6 The Customer warrants that it will not overload or exceed safe working specifications of the Equipment or breach any law or licence condition applicable to the Equipment.
- 4.7 Where there is damage to, or loss of, or a need to recover the Equipment (including any wreck) occurring during (or required as result of occurrences during) the period of the hire:
- (a) the Customer shall make effect replacement, repairs or recovery, or alternatively,
  - (b) the Company may effect replacement, repairs or recovery and the Customer shall indemnify the Company for the cost thereof.
- 4.8 The Customer undertakes to indemnify the Company in respect of any liability of the Company whatsoever and howsoever arising and any expenses incurred by the Company as a result of or arising out of a breach by the Customer of the warranties and undertakings contained in clause 4.

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## **5. Company's Liability**

- 5.1 The Company is not a common carrier and accepts no liability as such. The Company reserves the right to agree or refuse to provide the Services (or any part of them) in respect of Goods at its sole discretion.
- 5.2 The parties acknowledge that the Conditions make express provision for their rights, obligations and liabilities with respect to matters to which the Civil Liability Act 2002 (NSW) applies and, to the extent permitted by section 3A, expressly contract out of and exclude the operation of the provisions of the Civil Liability Act 2002 (NSW), including the Company's liability to the Customer.
- 5.3 Subject to clause 5.4, Goods are at all times at the risk of the Customer and not of the Company and the Company shall not be responsible in tort or contract or bailment or statute

or otherwise for any, and the consequences of any, loss of or damage to or deterioration or destruction of the Goods or any other property of the Customer or mis-delivery or failure to deliver or delay in delivery of the Goods or failure to provide or delay in providing the Services for any reason whatsoever howsoever caused (including but not limited to the negligence or breach of contract, whether fundamental or otherwise, or wilful act or default of the Company). This clause shall apply to all, and the consequences of all, such loss of or damage to or deterioration or destruction of the Goods and any other property of the Customer or mis-delivery or failure to deliver or delay in delivery of the Goods or failure to provide or delay in providing the Services, whether or not the same occurs in the course of performance by or on behalf of the Company of the contract or in events which are in the contemplation of the Company and/or the Customer or in events which are foreseeable by them or either of them or in events which could constitute a fundamental breach or a breach of a fundamental term of the contract.

- 5.4 The responsibilities and liabilities of the parties concerning carriage of Goods, for the period from loading of Goods onto a ship until discharge of the Goods from that ship, shall be as follows:
- (a) Where such carriage is compulsorily subject to any law or part of a law that cannot be modified or excluded (potentially including but not limited to the *Sea-carriage of Goods (State) Act 1921* (NSW), and the *Sea-Carriage of Goods Act 1909* (WA), and the *Carriage of Goods by Sea Act 1991* (Cwlth)), that law shall apply to the extent that it cannot be excluded;
  - (b) Otherwise, subject to clause 5.5, under the Hague-Visby Rules, which shall insofar as relevant form part of these Conditions.
- 5.5 For the purposes of clause 5.4, the Hague-Visby Rules shall be modified as follows:
- (a) The definition of "Contract of carriage" in Article 1, rule 1(b) shall be deleted and replaced with "**Contract of carriage** means these Conditions insofar as they concern carriage of Goods, for the period from loading of Goods onto a vessel until discharge of the Goods from that vessel";
  - (b) References to "bill of lading" shall be read as a reference to any receipt or consignment note issued by the Company concerning the carriage of the Goods, and
  - (c) Article 3, rules 3, 4 and 7, and Articles 5, 6 and 10 shall be deleted.
- 5.6 In all cases where liability of the Company has not been excluded or limited, whether by these Conditions, or due to any national law or by international Convention or otherwise, the liability of the Company whatsoever and howsoever arising (including but not limited to liability arising from negligence, breach of contract, whether fundamental or otherwise, or wilful act or default of the Company) is limited to the supplying of the Services again; or the payment of the cost of having the Services supplied again or A\$100.00, whichever is the lesser.

- 5.7 On application, the Company will offer in writing a higher price for requested Items and Services, in consideration for the deletion (in whole or in part) of clause 5.6 from these conditions. Where the Customer does not apply for and accept such an offer in writing, the Customer acknowledges that it could have but did not agree to pay a higher rate for the Items and Services without the limitation of liability contained in that clause.

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## **6. Subcontracting and Himalaya Clause**

- 6.1 The Customer authorises the Company to subcontract on any terms the whole or any part of the Services.
- 6.2 The Customer undertakes:
- (a) that no claim or allegation shall be made, whether by the Customer or any other person who is or may subsequently be interested in the Services and/or the Goods, against any Subcontractor which imposes or attempts to impose upon such Subcontractor any liability whatsoever and howsoever arising (including but not limited to liability arising from negligence or breach of contract, whether fundamental or otherwise, or wilful act or default of the Company or others) in connection with the provision of the Services and/or the Goods; and
  - (b) that, if such claim or allegation should nevertheless be made, the Customer shall indemnify the Company and the Subcontractor against whom such claim or allegation is made against the consequences of such claim or allegation.
- 6.3 Every exemption, limitation, condition, liberty, defence and immunity of whatsoever nature applicable to the Company or to which the Company is entitled in accordance with these Conditions shall also be applicable and shall extend to protect:
- (a) all Subcontractors;
  - (b) every other person (other than the Company) by whom the Services or any part of the Services are provided, their servants and agents; and
  - (c) all persons who are or may be vicariously liable for the acts or omissions of any persons falling within sub-paragraphs (a) or (b) of clause 6.3.
- 6.4 For the purpose of clauses 6.2 and 6.3, the Company is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of such persons and each of them and all such persons and each of them shall to this extent be or be deemed to be parties to this contract.

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## **7. Deviation and Time**

- 7.1 The Customer authorises any deviation from the usual manner in which the Services are provided which may in the absolute discretion of the Company be deemed reasonable or necessary in the circumstances.

- 7.2 If the Customer expressly or impliedly instructs the Company to use or it is expressly or impliedly agreed that the Company will use a particular method of providing the Services, the Company will give priority to that method but its adoption remains at the sole discretion of the Company and the Customer authorises the Company to provide the Services by another method.
- 7.3 Except where specified in writing by an Executive of the Company, no warranty is given that any Service will be commenced or completed, or any Items provided, by any specific date or time. Where a date or time is so specified, the Company shall use best endeavours to provide Services or Items by that date or time but no further warranty is given, and the Company shall have no liability whatsoever, howsoever arising, from a failure to provide Services or Items by that date or time.

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## **8. Conditions of Towage**

- 8.1 The Customer shall take out and, in their name and at their expense, maintain at all material times and throughout the duration of the contact a policy or policies of insurance in respect of:
- (a) all loss or damage to Customer Property and Goods, up to the full value of the Customer Property and Goods including but not limited to All Risks cargo cover in respect of Goods, hull & machinery cover in respect of the Customer Property and
  - (b) cover against liabilities to third parties (including liability in respect of death and injury and claims for consequential loss), and wreck removal of the Customer Property and Goods.
- 8.2 The Customer shall arrange at their expense that the Company shall be named as co-insured under the said policy or policies of insurance and arrange that the underwriters waive the right of subrogation. The Customer hereby agrees to produce the original certificates of insurance maintained hereunder to the Company or their appointed representatives when requested to do so.
- 8.3 Unless otherwise agreed, the United Kingdom Standard conditions for Towage and Other Services (Revised 1986) ("the UK Conditions (1986)") shall apply, save and except the UK Conditions (1986) shall be governed by the laws of New South Wales and the parties submit to the non-exclusive jurisdiction of the Courts of New South Wales. In the UK Conditions (1986), all references to Tug owner shall mean the Company and all references to Hirer shall mean the Customer. The Conditions shall prevail to the extent of any inconsistency.

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## **9. Company's Charges and Lien**

- 9.1 The charges of the Company for providing the Services or any part of them shall be earned as soon as the Goods are delivered to the Company and under no circumstances shall any of those charges be refunded (whether or not the services are performed or there is a breach or a fundamental breach of the contract by the Company). The Customer is and remains

responsible to the Company for all of its proper charges whether or not the Goods are delivered, lost, damaged or destroyed and/or whether or not the Services are performed.

- 9.2 The Company may charge by weight, measurement or value and may at any time reweigh, remeasure or revalue the Goods or require the Goods to be reweighed, remeasured or revalue and may charge proportional additional charges accordingly.
- 9.3 The Company shall have a lien on the Goods and any documents relating to those Goods and/or any other Goods or Items of the Customer in the possession or control of the Company for all sums payable by the Customer to the Company whether under this contract or otherwise whatsoever. The Company shall have the right to sell such Goods by public auction or private treaty without notice to the Customer. The Company shall be entitled to retain the sums due to it, in addition to the charges incurred in detention and sale of such Goods, from the proceeds of sale and shall render any surplus to the entitled person.
- 9.4 Every special instruction to the effect that charges shall be paid by a person other than the Customer shall be deemed to include a stipulation that, if that other person does not pay those charges within seven (7) days of delivery or attempted delivery of the Goods or Items or completion of the Services, then the Customer shall pay those charges to the Company within seven (7) days of being notified of that other person's failure to pay.

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## 10. Title and Security

- 10.1 Ownership of each unit of the Items will remain with the Company until all amounts owing by the Customer to the Company on any account whatsoever (including the purchase price for the Items) (**Amounts Owing**) have been Paid.
- 10.2 Until the Amounts Owing have been Paid, the Customer:
- (a) may, subject to clause 10.3, take possession of the Items and hold them as trustee and agent for the Company;
  - (b) must ensure that the Items are insured and stored or identified so that they are readily distinguishable from other goods held by the Customer or other persons.
- 10.3 Until the Amounts Owing have been paid, the Customer has the right to move, sell and otherwise use the Items in the ordinary course of its business, subject to the following:
- (a) the Customer may sell the Items, but only as trustee and agent for the Company; and
  - (b) the Customer must hold the proceeds it receives from any sale of the Items as trustee and agent for the Company; and
  - (c) the Customer must place the whole of the monetary proceeds in an ADI account separate from its own monies, maintain proper records of that ADI account and not allow any other person to have control of those proceeds; and

- (d) if the Items become part of a product or mass through manufacturing, processing, assembly or becoming commingled, the Company's security interest continues in that product or mass (**Commingled Property**) to the extent permitted by law.

Despite clause 10.3(a), the Customer must not represent to any third parties that it is acting as agent of the Company and the Company will not be bound by any contracts with third parties to which the Customer is a party.

- 10.4 If the Customer fails to comply with any terms of this agreement in relation to the payment of any Amount Owing or otherwise, then:
  - (a) immediately on the Company's request, the Customer must return to the Company any Items acquired from the Company; and
  - (b) the Company may enter the premises at which those Items are stored, and seize possession of them; and
  - (c) the Company may retain, sell or otherwise dispose of those Items.
- 10.5 The Customer must not assign or grant a security interest in respect of any accounts owed to it in relation to the Items without the Company's prior written consent. The Company has a security interest in all such accounts to secure the Amounts Owing.
- 10.6 Without limiting the meaning of Amounts Owing, if the Customer makes a payment to the Company at any time whether in connection with this agreement or otherwise the Company may apply that payment as it sees fit.
- 10.7 If Chapter 4 of the PPSA would otherwise apply to the enforcement of a security interest arising in connection with this agreement the Customer agrees the following provisions of the PPSA will not apply to the enforcement of this agreement: section 95 (notice of removal of accession), to the extent that it requires the Company to give a notice to the Customer; section 96 (when a person with an interest in the whole may retain an accession); subsection 121(4) (enforcement of liquid assets – notice to grantor); section 125 (obligation to dispose of or retain collateral); section 130 (notice of disposal), to the extent that it requires the Company to give a notice to the Customer; paragraph 132(3)(d) (contents of statement of account after disposal); subsection 132(4) (statement of account if no disposal); section 142 (redemption of collateral); and section 143 (reinstatement of security agreement).
- 10.8 Notices or documents required or permitted to be given to the Company for the purposes of the PPSA must be given in accordance with the PPSA.
- 10.9 The Customer consents to the Company affecting a registration on the PPSA register (in any manner the Company considers appropriate) in relation to any security interest contemplated by this agreement and the Customer agrees to provide all assistance reasonably required to facilitate this. The Customer waives the right to receive notice of a verification statement in relation to any registration on the register.

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## **11. GST**

- 11.1 Words and expressions used in this clause 11 which have a defined meaning in the *A New Tax System (Goods and Services Tax Act)* (**GST Act**) have the same meaning in this clause as in the GST Act. Unless expressly stated otherwise, all consideration to be provided under this document is expressed as exclusive of GST. If GST is payable by a supplier on any supply made under this document, the recipient will, upon receiving a tax invoice from the supplier, pay to the supplier an amount equal to the GST payable on the supply.

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## **12. Interest, Costs and no right of set-off**

- 12.1 Interest on overdue Invoices shall accrue from the date when payment becomes due, daily until the date of payment at a rate of 2.5% simple interest per calendar month and shall accrue at such a rate after as well as before any judgment;
- 12.2 If the Customer defaults in payment of any Invoices when due, the Customer shall indemnify the Company from and against all the Company's costs and disbursements on a solicitor and client basis and including all costs of engaging a licensed commercial agent for collection of payment of any outstanding Invoices.
- 12.3 The Customer shall not set off against the price owing to the Company for the hire, sale, performance or supply of any Equipment, Items and/or Services any amounts due from the Company or its sub-contractors to the Customer for any reason.

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## **13. Customer Insolvency**

- 13.1 In the following circumstances, clause 13.2 shall apply:
- (a) Any money payable to the Company becomes overdue, or in the Company's opinion the Customer will be unable to meet its payments as they fall due; or
  - (b) The Customer becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or a receiver, administrator, manager, liquidator (provisional or otherwise) or similar Person is appointed in respect of the Customer, the Customer's principal or any asset of the Customer or the Customer's principal;
- 13.2 Where clause 13.1 applies
- (a) The Company shall be entitled to cancel all or any part of any order for the Company to hire, sell perform or supply any Equipment, Items and/or Services which remains unperformed in addition to and without prejudice to any other remedies; and
  - (b) All amounts owing to the Company shall, whether or not due for payment, immediately become due and payable.

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#### **14. Company May Terminate, Suspend or Cancel Any Part of This Contract**

- 14.1 The Company may cancel this contract or cancel the hire, sale, performance, supply or delivery of any Equipment, Items and/or Services at any time before the Equipment, Items and/or Services are delivered, supplied or performance is completed by giving written notice.
- 14.2 Without prejudice to any other remedies the Company may have, if at any time the Customer is in breach of any obligation to the Company (including those relating to payment), the Company may suspend or terminate the hire, sale, performance or supply of any and all Equipment, Items and/or Services to the Customer and of any other obligation of the Company under this contract.

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#### **15. Notice of Loss and Time Bar**

- 15.1 Any claim for loss or damage to the Goods, Items or any other property of the Customer must be notified in writing to the Company within seven (7) days of delivery of the Goods or Items or of the date upon which the Goods or Items should have been delivered or when the Services are completed. The absence of such notice shall be prima facie evidence of the delivery of the Goods or Items by the Company to or as instructed by the Customer in good order and condition and that the Services have been performed in accordance with the contract.
- 15.2 In any event, the Company shall be discharged from all liability whatsoever in connection with this contract, the Services and/or the Goods unless suit is brought and notice of such suit is given in writing to the Company within nine (9) months of the completion of the Services or delivery of the Goods or, in cases where the Services were not provided or the Goods were not delivered, the date upon which the Services should have been completed or the Goods should have been delivered, whichever is the earlier.

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#### **16. Conditions and Severability**

- 16.1 All the rights, immunities and exclusions from or limitations of liability in these Conditions shall continue to have their full force and effect in all circumstances and notwithstanding any breach, whether fundamental or otherwise, of this contract or of these Conditions by the Company or any other person entitled to the benefit of the Conditions.
- 16.2 The provisions of these Conditions shall be severable and it is agreed that if any provision or any part of any provision of these Conditions is held to be invalid, void or unenforceable, such holding shall not affect any other provision or any other part of such provision of these Conditions.

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#### **17. Competition and Consumer Act**

Notwithstanding anything contained in these Conditions, the Company shall continue to be subject to any guarantee provided for in the *Competition and Consumer Act 2010 (Cth)*, as



amended, if and to the extent that that Act is applicable to this contract and prevents the exclusion, restriction and modification of such guarantee.

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## **18. Law and Jurisdiction**

- 18.1 Subject to clause 18.3, these Conditions and the contract shall be governed by and construed in accordance with the laws of the State of New South Wales, Australia.
- 18.2 New South Wales legislation that has the effect of limiting the rights of, or imposing obligations upon, the owner, charterer, master, or agent of any ship, or the ship itself, or the carrier of goods (such as but not limited to the *Sea-carriage of Goods (State) Act 1921* (NSW)) shall not apply except where it applies compulsorily by its own terms.
- 18.3 The Courts of the State of New South Wales, Australia shall have exclusive jurisdiction to hear and determine any dispute arising from or in connection with these Conditions, the contract and/or the provision of the Services.

Signed:

On behalf of:

Date: