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*Parts, Sales & Service for **Cummins engines***

Standard Terms and Conditions

governing the

Sale of Goods and Services



Includes trading entity: Spare Parts for **Cummins engines** - Online

Effective Date: 31st January, 2013

Torque Power Diesel (Australia) Pty Ltd

ACN 76 010078083

Established August 1978

Terms and Conditions for Supply of Goods and Services

Torque Power Diesel (Australia) Pty Ltd ABN 76 010 078 083

Definitions

1. "TPD" means Torque Power Diesel (Australia) Pty Ltd A.C.N. 010 078 083 including trading as Clessie Online.
"Goods" means all Goods (including Goods supplied in connection with the provision of Services) which TPD agree to provide to the Customer.
"Services" mean all Services which TPD agrees to provide to the Customer.
"Customer" means the person or entity:
 - (a) to which TPD has agreed to supply Goods and/or Services to and identified as such in any TPD document; or
 - (b) who orders Goods or Services Online."Customer's Property" means any property of the Customer delivered to TPD for the performance by TPD of the Services.
"Online" means any and all electronic connection with TPD and includes without limitation TPD's primary website and Clessie Online.

Terms

2. These terms apply to all Goods sold and all Services rendered by TPD. These terms override all terms proposed by any Customer including terms set out on any order or other document. If other terms are proposed these terms are deemed to be reoffered to, and accepted by, the Customer or their agents on delivery of the Goods or upon performance of the Services or where a Customer order is placed Online, once the order is received from the Customer. For Online orders, they will be deemed to be received from the Customer upon completion of the online check out process and payment is made.
3. These terms constitute the entire agreement. No other representations are made by or on behalf of TPD in relation to the supply of the Goods or Services. These terms may only be varied or additional terms incorporated if in writing signed by a director of TPD. There are no other terms and to the extent permitted all other terms including warranties that may be implied, including statutory terms, are excluded.
4. If any other trading agreement exists between the Customer and TPD these terms nevertheless apply to all Goods supplied and/or Services rendered which are also covered by that agreement. If there is any inconsistency between these terms and any other agreement, the terms of the trading agreement will prevail to the extent of any inconsistency. No trading agreement will legally bind TPD or the Customer unless in writing and signed by a representative of TPD of the status of General Manager or above, and the Customer.

Ordering, Acceptance and Price

5. Orders once received from the Customer are irrevocable and cannot be deferred, cancelled or suspended by the Customer unless agreed to in writing by TPD and the Customer indemnifies TPD for any costs and loss of profits. TPD however, may withdraw from the supply of Goods or Services ordered at any time up to the delivery of those Goods or the provision of those Services. Any quotation by TPD may be varied or withdrawn up to the time of delivery or provision of the Services and will lapse on any specified expiry date.
6. Prices quoted for the Goods or Services may change at any time. Prices relevant to orders for Goods and Services are those current at the time of placement of the order by the Customer or, where goods are ordered Online, at the time of payment by the Customer. Prices quoted Online may vary from over the counter sales.
7. If a price quoted for Goods and Services is not marked "Firm" the price is an estimate only. Where a quotation is an estimate only, the Customer shall pay to TPD the amount claimed by TPD upon delivery of the Goods or completion of provision of the Services, which may vary from the estimated amount and which amount shall be based on the actual work done and materials or Goods supplied by or on behalf of TPD.
8. Where a Customer requests TPD to prepare a quotation for the provision of Services, which requires TPD to perform disassembly of the Customer's Property and the Customer does not accept the quotation, the Customer shall be responsible for all labour and associated costs and charges incurred by TPD in preparation of the quotation. The Customer's Property will not be reassembled following rejection of the quotation unless the Customer requests TPD to do so and agrees to pay for such re-assembly.
9. The Customer is responsible for ensuring that all quotations and orders are accurate. TPD takes no responsibility for errors in respect of the Goods or Services, quantity or price set out in any quotation or order. Confirmation of order documents must be clearly marked otherwise they will be treated as original orders.

10. TPD shall be entitled to vary the price of any Goods and Services at any time prior to delivery of the Goods or completion of the Services, if the cost to TPD of performing its obligations is increased or reduced including without limitation by:
- (a) any new or amended legislation, regulation, order, directive, by-law, license or approval;
 - (b) any fluctuations in currency value;
 - (c) any rise or fall in the amounts payable for labour, charges, in the amounts charged to TPD by its suppliers;
 - (d) any cause beyond the direct control of TPD;
 - (e) any variation in quantity or in pack sizes.
- No variation shall entitle a Customer to cancel an order.
11. All prices quoted or advised for Goods are exclusive of GST and are strictly net based on the quantity and pack sizes (as applicable) at the date of quotation or order. If GST is applicable, the Customer will pay for the GST at the same time as payment for the Goods and/or Services is due.
12. The Customer is responsible for the following costs and charges in addition to the price unless otherwise specified in TPD's quotation:
- (a) drums, cases and packages;
 - (b) special packaging or tooling requirements;
 - (c) insurance for Goods in transit from TPD's premises;
 - (d) service charge where the invoice value is below the minimum determined by TPD from time to time;
 - (e) expenses incurred by TPD due to deferral of delivery at the Customer's request beyond the delivery date specified or cancellation of the Customer's invoice; and
 - (f) GST and all other statutory taxes and charges.
13. If for any reason the Goods ordered are unavailable or TPD reasonably considers it necessary to make changes to the Goods to improve the Goods, TPD has the right to substitute alternative Goods provided they are reasonably equivalent in all respects (unless the Customer's order specifies otherwise). If quantity and pack sizes vary from the date of quotation or order TPD may substitute alternative sizes but not so that the Customer is required to purchase in aggregate more Goods than ordered.
14. Specifications, including without limitation performance, dimensions and weight are approximate only and TPD shall not be liable for any error or inaccuracy in the specifications provided.
15. If TPD agrees to make available any Goods for the carrying out of any tests or certification processes, then those tests or processes will be carried out by the Customer at the Customer's cost and risk. By providing Goods for the undertaking of testing or processes pursuant to this clause TPD expressly does not assume any responsibility for the Goods whatsoever including any liability if the results of the tests or processes carried out are wrong.
16. Where the Customer requests TPD to provide Services, the Customer authorises such additional Services and tests as TPD honestly believes may be necessary in connection with the Services and agrees to pay TPD for the charges for the additional Services.

Packaging and Delivery

17. Delivery of Goods and return of Customer's Property will take place at TPD's premises where the Customer's order is accepted unless TPD agrees at the Customer's cost and risk to effect delivery or arrange freight to an address specified by the Customer, in which case delivery will take place at such address. The Customer will provide all necessary labour and equipment to safely off load the Goods or Customer's Property at a reasonable access point at any address specified for delivery. The Customer will indemnify TPD for any delay or cost incurred if the Customer does not provide offloading and, if incurred by TPD at TPD's sole discretion, the cost incurred in arranging necessary labour and equipment to offload the Goods.
18. Subject to the remainder of this paragraph, acceptance of delivery of the Goods by the Customer is deemed to be acceptance of the condition and correctness of Goods ordered. The Customer must notify TPD in writing immediately if the Goods or Customer's Property is not received within 7 days of receipt by the Customer of TPD's delivery advice or invoice. Unless the Customer notifies TPD of any shortage within 5 days of receipt by the Customer of the Goods or Customer's Property, complete delivery will be deemed to have occurred.
19. TPD reserves the right to supply or deliver by instalments, and each instalment will be deemed to be sold under a separate contract. Failure to supply or deliver any instalment will not entitle the Customer to repudiate any order.

20. The dates given for delivery are estimates only and TPD is not liable for any delay in delivery of the Goods howsoever arising.
21. If as a result of any action or inaction on the part of the Customer, the Goods or Customer's Property is not collected or dispatched from TPD's premises within 7 days after TPD notifies the payment notwithstanding any other payment terms agreed and TPD shall further be entitled to charge the Customer for storage of the Goods or Customer's Property until they are delivered to the Customer. Storage will be charged, based on the normal shop technician retail labour rate at the time of the Service, to equal one third hour per day or part thereof.
22. In addition to any other rights that TPD may have, the Disposal of Uncollected Goods Act (Qld) ("the DUG Act") shall apply to any Customer's Property left uncollected at TPD's premises following repair or other treatment. Where the Customer leaves the Customer's Property at TPD's premises, the Customer acknowledges having read the notice displayed at those premises pursuant to the DUG Act and the Customer's address for service of any notices is the address set out in this or other attached documents.

Safety

23. Prior to any order and at delivery, the Customer must ensure it and/or its agents have all documents and information regarding all Goods which may be supplied by TPD, as required under all health and safety and environmental laws and standards. Unless the Customer notifies TPD of any shortage within 5 days of receipt by the Customer of the Goods or Customer's Property, the Customer will be deemed to have received all such documents and information referred to in this clause.

Title and Risk

24. Notwithstanding delivery or freight arrangements, risk (including deterioration, loss or damage) passes to the Customer preloading at TPD's premises, if shipped directly from the manufacturer preloading at the manufacture's premises or if shipped directly from outside Australia preloading at the port of entry in Australia. The Customer is responsible for all insurance of the Goods from the point when risk passes.
25. Title passes to the Customer when TPD has been paid in full for all Goods supplied by it to the Customer including any freight charges. If TPD has provided Goods to the Customer in instalments, property and title will not pass in any instalment of the Goods until payment has been made for all instalments of the Goods.
26. The Customer's Property shall be at the Customer's risk whilst in TPD's possession for the provision of Services and TPD shall not be liable for any loss from or damage to the Customer's Property (including contents and attachments) whether arising from breach of contract, negligence or otherwise howsoever arising. Where the Customer's Property forms part of or is attached to a vehicle, permission is granted by the Customer for that vehicle to be driven by TPD on public roads, chassis dynamometer or other testing equipment, at the Customer's risk for the purpose of testing or otherwise in connection with the provision of the Services.
27. If the Customer makes a new object using the Goods or mixes the Goods with other Goods or the Goods become part of the other Goods (in each case referred to as "New Goods"), the Customer agrees that ownership of the New Goods immediately passes to TPD upon commencement of any operation or event by which the Goods would be converted into New Goods. Until TPD is paid all amounts due by the Customer (whether for the Goods or otherwise) the Customer will hold the New Goods as a bailee and fiduciary for TPD and the provisions of this clause shall apply.
28. Notwithstanding clause 26, the Customer may sell Goods and New Goods to a third party in the ordinary course of business and deliver them to that third party provided however that:
 - (a) if the Customer is paid by the third party, the Customer holds the whole of the proceeds of sale on trust for TPD and shall not mingle any of the proceeds of sale with other money and shall ensure that all such receipts are kept separate and identifiable. Immediately on receipt of the proceeds of sale, the Customer shall remit from the proceeds received an amount equal to the amount owing by the Customer to TPD; or
 - (b) if the Customer is not paid by a third party, the Customer agrees at TPD's option, to assign the Customer's claim against the third party to TPD upon written request by TPD. The Customer irrevocably appoints TPD as its attorney for the purpose of giving effect to this clause.
29. If the Customer is insolvent or commits an act of bankruptcy or is or states that it is unable to pay its debts; or an order is made or an application for an order is lodged or a meeting is convened for the appointment of an administrator, receiver, manager or a liquidator; or payment is not made on or before a due date, then immediately upon request by TPD the Customer shall deliver up all Goods to TPD failing which TPD by its servants and agents is hereby irrevocably authorised at any time to enter the place where Goods are located and to remove the Goods regardless of whether the Goods have become fixed to any place, vehicle, vessel or things and for this purpose TPD is appointed the Customer's agent. The Customer shall indemnify TPD and keep TPD indemnified against all costs incurred by TPD and all claims made against TPD arising from such removal.
30. If TPD replaces any part of the Customer's Property during the performance of Services or agrees to replace any Goods or part thereof, then the replaced items shall become the property of TPD unless otherwise expressed in writing.

Intellectual Property

31. Intellectual property in all Goods, documents, drawings, specifications, photographs, computer programs, schedules and tables produced by TPD or on TPD's behalf in connection with the Goods or Services at all times remains the property of TPD ("Intellectual Property Rights"). Intellectual Property Rights includes copyright, design and proprietary interest in the Goods.

Invoicing and Payment

32. Payment must be made net cash on delivery of the Goods and/or completion of the Services, unless TPD has prior to that date agreed in writing and signed by a representative of TPD and the Customer, to provide Credit Account facilities. Where Goods are ordered Online, the Customer must pay for the Goods by the PayPal electronic payment system ("PayPal") on submission of an order. When placing an order, the Customer must elect to receive the Goods and/or Services by Road or Air Freight. On receipt of an order, TPD will advise freight charges to the Customer. TPD will charge, where freight costs are fixed, at cost or where freight costs are not fixed, at an amount having regard to quoted amount plus for additional costs as it reasonably determines. The Customer will pay all freight charges as advised by TPD at the time of payment for the Goods and/or Services or, where Goods are ordered Online, by PayPal within 2 business days of being advised of relevant charges.
33. Should any payment be conditional or subsequently not be effective or freight charges not be paid, then TPD may without notice cease to proceed and cancel the order. Where Credit Account facilities are provided, payment is required by the 21st day of the month following the month in which the Goods and/or Services are invoiced ("the Due Date"). The credit limit as specified by TPD is the maximum limit and shall not be exceeded and TPD reserves the right to vary the credit limit at its discretion. In the event payment is not made by the Due Date TPD reserves the right to, without prejudice to any other remedy:
- (a) suspend or cancel performance and delivery of all Goods and Services until all outstanding payments are made and to adjust the amount payable by the Customer to compensate TPD for any extra expense or loss, without limiting any right to take proceedings for recovery; and
 - (b) the Customer must pay interest equal to .05% per day, or other rate advised in writing, to be compounded upon the amount owing and to be billed at the end of each month following the due date or at settlement of overdue accounts.

The Customer is not entitled to any retention or otherwise retain any amount due to TPD. All payments are to be made without deduction or equitable or other set off whatsoever.

34. Until TPD has been paid in full for all Goods supplied by it to the Customer including any freight charges:
- (a) TPD remains the owner of the Goods and the Customer holds the Goods as bailee only;
 - (b) the Customer must store the Goods separately from any other Goods, keep them readily identifiable as TPD's Goods and maintain proper records of any sale or disposal of the Goods;
 - (c) the Customer has a duty to safely and securely store the Goods;
 - (d) the Customer bears all risk in respect of the Goods from delivery and must fully insure them against all insurable risks;
 - (e) the Customer will not sell the Goods except in the ordinary course of business; and
 - (f) where the Customer does sell the Goods in the ordinary course of business, the Customer will hold the proceeds of any sale or disposal to the extent of the amount due to TPD in a separate account for TPD's benefit and promptly pay that amount to TPD.
35. At all times the Customer will allow TPD access to the premises occupied by the Customer during normal business hours and to the Goods in order to inspect the Goods and retake possession of the Goods at any time prior to payment in full of the price payable for all Goods supplied by TPD to the Customer and for other monies payable by the Customer to TPD. The Customer acknowledges that this access shall be full, free and unhindered and shall not be or constitute trespass by TPD. The Customer indemnifies TPD for any liability or loss it suffers seeking to exercise its rights of access and retaking possession.

Warranty and Indemnity

36. Errors and misprints in computation, typing or otherwise in TPD's documents including catalogues, websites, price lists, delivery docket, invoice or statement or credit note shall be subject to correction by TPD by means of reissue of the document or by adjusting dockets with reference to the original transaction.
37. Warranties apply as follows:
- (a) where Goods supplied by TPD have been manufactured or remanufactured other than by TPD, the only warranty applicable to those Goods is the warranty of the manufacturer and TPD gives no warranty whatsoever;

- (b) where Goods supplied by TPD have been manufactured or remanufactured by TPD, TPD warrants that those Goods will be free from defects in workmanship on supply and will remain that way under normal use and service for a period of 12 months from the date of invoice or where a customer order is placed Online, from the date the order is received from the Customer ("TPD Goods Warranty / TPD Goods Warranty Period"); and
- (c) used Goods supplied by TPD, no warranty applies.

The TPD Goods Warranty will be deemed to be satisfied unless TPD receives the alleged defective Goods and details of the defect in writing by the end of the TPD Goods Warranty Period. Subject to acceptance by TPD that the Goods do not meet the TPD Goods Warranty, TPD will repair or replace the Goods with the same or similar Goods or pay the cost thereof in TPD's absolute discretion. The Customer will bear all costs of transportation to and from a dispatch or service facility.

- 38. If Services are performed by TPD, then TPD warrants that the Services will be performed in a good and workmanlike manner and remain that way for a period of 90 days from the date of invoice separate from any warranty given in relation to the Goods ("TPD Services Warranty / TPD Services Warranty Period"). The TPD Services Warranty will be deemed to be satisfied unless TPD receives the alleged defective goods on which Services were performed by TPD and details of the defect in writing by the end of the TPD Services Warranty Period. Subject to acceptance by TPD that the goods do not meet the TPD Services Warranty, TPD will supply the Services again or pay the cost thereof in TPD's absolute discretion. The Customer will bear all costs of transportation to and from a dispatch or service facility.
- 39. Warranties and provisions that may be implied by the *Trade Practices Act 1974* and any other legislation are expressly excluded except to the extent that exclusion is prohibited by the legislation and this overrides these terms.
- 40. Subject to paragraph 37, 38 and 39, TPD gives no warranty whatsoever in relation to the Goods sold to the Customer or the Services, whether in regard to the quality of the Goods or the Services, the fitness of the Goods or the Services for any purpose or the compliance of the Goods or Services sold with any description or sample produced by either party to the other at any time, whether prior to, at the time of or subsequent to the Customer placing an order for the Goods with TPD, or otherwise.
- 41. The Customer acknowledges that it is not induced by any misrepresentation made by or on behalf of TPD and that the Customer has not relied on TPD's skill and judgment and the Customer has satisfied itself that the Goods and Services are suitable for the Customer's purposes.
- 42. The Customer warrants that the Goods will be installed and used (a) only in applications for which the Goods were manufactured and are able to be satisfied by the Goods specifications and (b) in accordance with all manufacturer's instructions and good and usual industry standards including being fully tested as safe prior to use. The Customer must comply with all instructions provided in connection with the Goods and/or Services and if there is any uncertainty regarding those instructions or use of the Goods, they must seek prompt advice from TPD or the manufacturer.
- 43. Subject to paragraph 39, any remaining liability of TPD, if any, to the Customer arising from the supply of Goods or Services by TPD or pursuant to any contract whether the liability arises for breach of contract or at common law, including the law relating to negligence by TPD, is limited to:
 - (a) in the case of Goods, any one or more of the following as determined by TPD in its absolute discretion:
 - (i) the replacement of the Goods and the supply of equivalent goods;
 - (ii) the repair of the Goods;
 - (iii) the payment of the cost of replacing the Goods or of acquiring equivalent goods; or
 - (iv) the payment of the cost of having the Goods repaired;
 - (b) in the case of Services, any one or more of the following as determined by TPD in its absolute discretion:
 - (i) the supplying of the Services again; or
 - (ii) the payment of the cost of having the Services supplied again.

The Customer will bear all costs of transportation to and from a dispatch or service facility. In no case will TPD incur liability for any loss or damage on account of losses or damages suffered by the Customer including loss of profit, damage to property or personal injury arising from that supply or that agreement, whether arising directly, incidentally or consequentially.

- 44. Subject to paragraph 39, all information contained in any documents, catalogues, websites, price lists, photographs, brochures and other illustrations or advertising material and drawings represent generally the subject matter of the Goods and Services and will not be taken as necessarily representing the Goods or Services the subject of any quotation or order and will not form part of any contract or agreement for supply.
- 45. Subject to paragraph 39, except as otherwise expressly provided in these terms, the Customer releases TPD from all actions, claims, demands, losses, liabilities, damages and expenses arising from or in relation to the supply of the Goods or Services, including without limitation for loss of profit and consequential losses and indemnifies TPD for any loss or liability that TPD may

suffer (including without limitation the legal costs on an indemnity basis in defending or prosecuting any claim) arising from the use by the Customer of the Goods or Services or a breach of these terms including warranties by the Customer.

46. If the Services are performed on TPD's behalf by a sub-contractor, those Services are subject only to the then applicable sub-contractor's warranty, details of which have been provided or will be made available to the Customer upon request and except to the extent prohibited by law, all other warranties in relation to the Goods and Services are excluded.
47. No warranty, representation or statement by any employee, representative or agent of TPD, relating to the repair shall bind TPD and TPD shall not incur any obligation whatsoever for any such promise, representation or statement.
48. All limitations of liability contained in these terms shall continue to have full force and effect in all circumstances and notwithstanding any breach or contract or negligence by TPD or any other person entitled to rely on the same.

Exchange Goods

49. Where TPD agrees to provide a new part for payment plus the exchange of the core of an old part ("the Exchange Part Core") and the Exchange Part Core is not provided at or before collection of the new part, then the Customer will pay a deposit ("the Core Deposit") in relation to delivery of the Exchange Part Core as nominated by TPD representing the value to TPD of the Exchange Part Core. The Core Deposit will only be refunded to the Customer if the following conditions apply:
 - (a) the Exchange Part Core is in off engine condition, namely it has not been disassembled by the Customer nor the Customer's agent, it is intact as an overall assembly and it is not damaged by fire, rust or other non-operational causes;
 - (b) the Exchange Part Core is delivered to TPD within 14 days of delivery of the new part;
 - (c) the Exchange Part Core meets the 'Core Acceptance Standards' published separately and available from TPD on request; and
 - (d) the Exchange Part Core is accompanied by the original purchasing Core Deposit Return Slip previously issued concurrent with the Exchange Part Core invoice).
50. If the Exchange Part Core does not meet the Core Acceptance Standards referred to above, TPD may at its discretion reject the Exchange Part Core or apply penalty charges as set out in the Core Acceptance Standards for Damaged Cores. Any Core Deposit not refundable to the Customer will be retained by TPD as part of the purchase price of the new Goods.

Company Connection

51. The Customer must not advertise or publish that the supplier and TPD have a contract for the supply of Goods or to refer to TPD in any advertising and/ or merchandising material without first obtaining the prior written consent of TPD. The Customer must not reproduce, modify, amend or publish, or allow to be reproduced, modified, amended or published, TPD's registered or unregistered trade marks, names or logos without first obtaining the prior written consent of TPD.

General

52. If any dispute arises in relation to Goods supplied by TPD to the Customer TPD may by notice to the Customer at any time prior to determination by a court require that such dispute or part thereof be determined by arbitration according to law. The arbitration is to be conducted in accordance with the relevant Commercial Arbitration Act (of whatever name) of the State or Territory nominated as being the governing law and in the capital city of that State or Territory. TPD may, give notice that any dispute with the Customer is arbitrated with any other dispute relating to the same Goods or issues. There is to be a single arbitrator appointed by agreement or failing agreement by the president of the law society of that State or Territory. The arbitrator's decision is final and binding subject to any right of appeal under the relevant Commercial Arbitration Act. The reference of a dispute to arbitration does not affect the Customer's obligation to pay the price of Goods when due which must be paid without deduction or equitable or other set off pending the resolution of any dispute whether referred to arbitration or otherwise.
53. These terms will be governed by and construed in accordance with the laws of a State or Territory of Australia as TPD directs and the Customer irrevocably submits to the exclusive jurisdiction of a competent court in the capital city of that State or Territory.
54. Expressions defined in brackets in these terms will be given the meaning where defined throughout these terms whether or not the definition is used again before or after where the expression is defined.
55. Failure by TPD to insist on performance of these terms or exercise any right or remedy for breach, is not a waiver of any other non performance or breach.
56. If any of these terms are or later become illegal or unenforceable, the illegal or unenforceable part of those terms are taken to be severed from these terms, but all other terms remain in place.

End.