

# Terms and Conditions

## Definitions

1.1 "Contractor" shall mean W D Mackenzie Transport Limited and its successors and assigns or any person acting on behalf of and with the authority of W D Mackenzie Transport Limited.

1.2 "Sub-Contractor" shall mean and include;

(a) railways or airways operated by the Commonwealth or any State or any other country or by any corporation; or

(b) any other person or entity with whom the Contractor may arrange for the carriage or storage of any Goods the subject of the contract; or

(c) and any person who is now or hereafter a servant, agent, employee or sub-contractor of any of the persons referred to in clause 1.2(a) and 1.2(b).

1.3 "Customer" shall mean the Customer or any person or persons acting on behalf of and with the authority of the Customer. Where more than one Customer has entered into this agreement, the Customers shall be jointly and severally liable for all payments of the Price.

1.4 "Consignee" shall mean the person to whom the Goods are to be delivered by way of the Contractor's Services.

1.5 "Goods" shall mean cargo together with any container, packaging, or pallet(s) to be moved from one place to another by way of the Contractor's Services, or for storage by the Contractor.

1.6 "Services" shall mean all services supplied by the Contractor to the Customer and are as described on the quotations, invoices, consignment note, airway bills, manifests, sales order or any other forms as provided by the Contractor to the Customer and includes any advice or recommendations.

1.7 "Price" shall mean the cost of the Services as agreed between the Contractor and the Customer subject to clause 3 of this contract.

## Acceptance

2.1 Any instructions received by the Contractor from the Customer for the supply of Services shall constitute acceptance of the terms and conditions contained herein.

2.2 Upon acceptance of these terms and conditions by the Customer the terms and conditions are irrevocable and can only be rescinded in accordance with these terms and conditions or with the written consent of the manager of the Contractor.

2.3 These terms and conditions are to be read in conjunction with the Contractor's quotation, consignment note, agreement, airway bills, manifests, or any other forms as provided by the Contractor to the Customer. If there are any inconsistencies between these documents then the terms and conditions contained in this document shall prevail.

2.4 The Customer shall give the Contractor not less than fourteen (14) days prior written notice of any proposed change of ownership of the Customer or any change in the Customer's name and/or any other change in the Customer's details (including but not limited to, changes in the Customer's address, facsimile number, or business practice). The Customer shall be liable for any loss incurred by the Contractor as a result of the Customer's failure to comply with this clause.

2.5 The Customer acknowledges that all articles are carried or transported and all storage and other services are performed by the Contractor subject only to these conditions and the Contractor reserves the right to refuse the carriage or transport of articles for any person, corporation or body, and the carriage or transport of any class of articles at its discretion.

## Price And Payment

3.1 At the Contractor's sole discretion the Price shall be either;

- (a) as indicated on invoices provided by the Contractor to the Customer in respect of Services supplied; or
- (b) Contractor's quoted Price (subject to clause ) which shall be binding upon the Contractor provided that the Customer shall accept in writing the Contractor's quotation within thirty (30) days.

3.2 The Contractor may by giving notice to the Customer increase the Price of the Services to reflect any increase in the cost to the Contractor beyond the reasonable control of the Contractor (including, without limitation, foreign exchange fluctuations, or increases in taxes, customs duties, insurance premiums, or warehousing costs).

3.3 The Contractor may charge freight by weight, measurement or value, and may at any time re-weigh, or re-value or re-measure or require the Goods to be re-weighed, or re-valued or re-measured and charge proportional additional freight accordingly.

3.4 The Contractor may charge an hourly rate which rate shall commence from the time that the Contractor leaves their business premises and/or their previous worksite (travel times will be calculated based on the same distance radius from the Contractor's business premises to the new worksite).

3.5 At the Contractor's sole discretion a deposit may be required.

3.6 At the Contractor's sole discretion:

- (a) payment shall be due on delivery of the Goods; or
- (b) payment for approved Customers shall be made by instalments in accordance with the Contractor's payment schedule; or
- (c) payment for approved Customer's shall be due twenty (20) days following the end of the month in which a statement is posted to the Customer's address or address for notices.

3.7 Time for payment for the Services shall be of the essence and will be stated on the invoice, consignment note, airway bills, manifests or any other forms. If no time is stated then payment shall be due seven (7) days following the date of the invoice.

3.8 Payment will be made by cash, or by cheque, or by bank cheque, or by direct credit, or by any other method as agreed to between the Customer and the Contractor.

3.9 GST and other taxes and duties that may be applicable shall be added to the Price except when they are expressly included in the Price.

## Customer-Packed Containers

4.1 If a Container has not been stowed by or on behalf of the Contractor the Contractor shall not be liable for loss of or damage to the Goods caused by:

- (a) the manner in which the Container has been stowed; or
- (b) the unsuitability of the Goods for carriage or storage in Containers; or

(c) the unsuitability or defective condition of the Container.

## Nomination Of Sub-Contractor

5.1 The Customer hereby authorises the Contractor (if it should think fit to do so) to arrange with a Sub-Contractor for the carriage of any Goods that are the subject of the contract. Any such arrangement shall be deemed to be ratified by the Customer upon delivery of the said Goods to such Sub-Contractor, who shall thereupon be entitled to the full benefit of these terms and conditions to the same extent as the Contractor. In so far as it may be necessary to ensure that such Sub-Contractor shall be so entitled the Contractor shall be deemed to enter into this contract for its own benefit and also as agent for the Sub-Contractor.

## Method Of Transport

6.1 If the Customer instructs the Contractor to use a particular method of carriage whether by road, rail, sea or air the Contractor will give priority to the method designated but if that method cannot conveniently be adopted by the Contractor the Customer shall be deemed to authorise the Contractor to carry or have the Goods carried by another method or methods.

## Route Deviation

7.1 The Customer shall be deemed to authorise any deviation from the usual route or manner of carriage of Goods that may in the absolute discretion of the Contractor be deemed reasonable or necessary in the circumstances.

## Delivery

8.1 The Contractor is authorised to deliver the Goods at the address given to the Contractor by the Customer for that purpose and it is expressly agreed that the Contractor shall be taken to have delivered the Goods in accordance with this contract if at that address the Contractor obtains from any person a receipt or a signed delivery docket for the Goods.

8.2 The Contractor may deliver the Goods by separate instalments (in accordance with the agreed delivery schedule). Each separate instalment shall be invoiced and paid for in accordance with the provisions in this contract.

8.3 Delivery of the Goods to a third party nominated by the Customer is deemed to be delivery for the purposes of this agreement.

8.4 It is the Customer's sole responsibility to address adequately each consignment and to provide written delivery instructions to enable effective delivery.

8.5 The failure of the Contractor to deliver shall not entitle either party to treat this contract as repudiated.

## Loss Or Damage

9.1 This contract is "at limited contractor's risk".

9.2 Subject to statutory provisions imposing liability in respect of the loss of or damage to the Goods (including but not limited to chilled, frozen, refrigerated or perishable Goods):

(a) the Contractor shall not be under any liability, howsoever caused or arising and (without limiting the generality of the foregoing) whether caused or arising as a result of the negligence of the Contractor or otherwise, for any damage to, loss, deterioration, mis-delivery, delay in delivery or non-delivery of the Goods (whether the Goods are or have been in the

possession of the Contractor or not) nor for any instructions, advice, information or service given or provided to any person, whether in respect of the Goods or any other thing or matter, nor for any consequential or indirect loss, loss of market or consequences of delay; and

(b) the Customer will indemnify the Contractor against all claims of any kind whatsoever, howsoever caused or arising and, (without limiting the generality of the foregoing) whether caused or arising as a result of the negligence of the Contractor or otherwise, brought by any person in connection with any matter or thing done, said or omitted by the Contractor in connection with the Goods.

## Insurance

10.1 The Customer acknowledges that:

(a) the Goods are carried and stored at the Customer's sole risk and not at the risk of the Contractor; and

(b) the Contractor is under no obligation to arrange insurance of the Goods and it remains the Customer's responsibility to ensure that the Goods are insured adequately or at all; and

(c) under no circumstances will the Contractor be under any liability with respect to the arranging of any such insurance and no claim will be made against the Contractor for failure to arrange or ensure that the Goods are insured adequately or at all.

## Claims

11.1 Notwithstanding clauses and in the event that the Customer believes that they have any claim against the Contractor then they must lodge any notice of claim for consideration and determination by the Contractor within seven (7) days of the date of delivery, or for non delivery within seven (7) days of the anticipated date of delivery or the removal or destruction of the Goods.

11.2 The failure to notify a claim within the time limits under clause is evidence of satisfactory performance by the Contractor of its obligations.

## Unpaid Contractor's Rights to Dispose of Goods

12.1 The Contractor shall have a security interest in any Goods (and any documents relating to those Goods) in the possession or control of the Contractor for all sums payable by the Customer to the Contractor, and the Contractor shall have the right to sell such Goods or cargo by public auction or private treaty after giving notice to the Customer. The Contractor shall be entitled to retain the sums due to it (in addition to the charges incurred in the detention and sale of such Goods or cargo) from the proceeds of sale and shall render any surplus to the entitled person.

## Charges Earned

13.1 The Contractor's charges shall be considered earned in the case of Goods for carriage as soon as the Goods are loaded and dispatched from the Customer's premises.

## Demurrage

14.1 The Customer will be and shall remain responsible to the Contractor for all its proper charges incurred for any reason. A charge may be made by the Contractor in respect of any delay in excess of thirty (30) minutes in loading or unloading occurring other than from the default of the Contractor. Such permissible delay period shall commence upon the Contractor reporting for loading or unloading. Labour to load or unload the vehicle shall be the responsibility and expense of the Customer or Consignee.

## Dangerous Goods

15.1 Dangerous Goods are Goods which are or may become of a dangerous, noxious, explosive, inflammable, radio-active or damaging nature and include Goods likely to harbour or encourage vermin or other pests. Unless agreed in writing, the Customer shall not deliver to the Contractor, or cause the Contractor to deal with or handle, Dangerous Goods.

15.2 If the Customer is in breach of Clause :

(a) the Customer, and any person delivering the Goods to the Contractor, or causing the Contractor to handle or deal with the Goods, shall be liable for any loss or damage caused to, or by the Goods, or by their nature, and shall indemnify and keep indemnified the Contractor against all loss, damages, claims and costs (howsoever arising) incurred by the Contractor in connection therewith; and

(b) the Goods may be destroyed or otherwise dealt with as determined by the Contractor in its absolute discretion at the expense of the Customer (or by any other person in whose custody they may be at the relevant time also at the expense of the Customer), and neither the Contractor nor any such other person shall incur any liability whatsoever to the Customer in relation to any action taken by them concerning the Goods.

15.3 Where the Contractor agrees to accept Dangerous Goods, if during the period of cartage, the Contractor, its Sub-Contractors (or any other suitably qualified person or authority) reasonably forms the view that those Goods pose any risk to other goods, property, life or health, then the provisions of clauses & shall apply.

## Consignment Note

16.1 It is agreed that the person delivering any Goods to the Contractor for carriage or forwarding is authorised to sign the consignment note for the Customer.

## Customer's Responsibility

17.1 The Customer expressly warrants to the Contractor that the Customer is either the owner or the authorised agent of the owner of any Goods or property that is the subject matter of this contract of cartage and/or storage and by entering into this contract the Customer accepts these conditions of contract for the Consignee as well as for all other persons on whose behalf the Customer is acting.

## Contractor's Servants or Agents

18.1 The Customer undertakes that no claim or allegation shall be made against any servant or agent of the Contractor which attempts to impose upon any of them any liability whatsoever in connection with the Goods and, if any such claim or allegation should nevertheless be made, to indemnify the Contractor and any such servant or agent against all consequences thereof.

## Consumer Guarantees Act 1993

19.1 This agreement is subject to the provisions of the Consumer Guarantees Act 1993 in all cases except where the Customer is contracting within the terms of a trade/business (which cases are specifically excluded).

19.2 The Contractor shall be under no liability whatsoever for loss or damage to Goods unless;

(a) the Customer provides written notice to the Contractor detailing the alleged damage, and that such written notice shall be received by the Contractor within seven (7) days after the delivery of the Goods; or

(b) in the case where the Goods have been lost in transit then the Customer shall be required to provide written notice

detailing the alleged loss within fourteen (14) days of the date of dispatch of the Goods.

## Default and Consequences of Default

20.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and a half percent (2.5%) per calendar month (and at the Contractor's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.

20.2 If the Customer owes the Contractor any money the Customer shall indemnify the Contractor from and against all costs and disbursements incurred by the Contractor in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, the Contractor's collection agency costs, and bank dishonour fees).

20.3 Without prejudice to any other remedies the Contractor may have, if at any time the Customer is in breach of any obligation (including those relating to payment) under these terms and conditions the Contractor may suspend or terminate the supply of Goods to the Customer. The Contractor will not be liable to the Customer for any loss or damage the Customer suffers because the Contractor has exercised its rights under this clause.

20.4 Without prejudice to the Contractor's other remedies at law the Contractor shall be entitled to cancel all or any part of any order of the Customer which remains unfulfilled and all amounts owing to the Contractor shall, whether or not due for payment, become immediately payable if:

- (a) any money payable to the Contractor becomes overdue, or in the Contractor's opinion the Customer will be unable to make a payment when it falls due;
- (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
- (c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Customer or any asset of the Customer.

## Security And Charge

21.1 Despite anything to the contrary contained herein or any other rights which the Contractor may have howsoever:

- (a) where the Customer is the owner of land, realty or any other asset capable of being charged, the Customer agrees to mortgage and/or charge all of their joint and/or several interest in the said land, realty or any other asset to the Contractor or the Contractor's nominee to secure all amounts and other monetary obligations payable under the terms and conditions. The Customer acknowledges and agrees that the Contractor (or the Contractor's nominee) shall be entitled to lodge where appropriate a caveat, which caveat shall be released once all payments and other monetary obligations payable hereunder have been met.
- (b) should the Contractor elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Customer shall indemnify the Contractor from and against all the Contractor's costs and disbursements including legal costs on a solicitor and own client basis.
- (c) the Customer agrees to irrevocably nominate constitute and appoint the Contractor or the Contractor's nominee as the Customer's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause .

## Privacy Act 1993

22.1 The Customer authorises the Contractor or the Contractor's agent to:

- (a) access, collect, retain and use any information about the Customer;
- (i) (including any overdue fines balance information held by the Ministry of Justice) for the purpose of assessing the

Customer's creditworthiness; or

(ii) for the purpose of marketing products and services to the Customer.

(b) disclose information about the Customer, whether collected by the Contractor from the Customer directly or obtained by the Contractor from any other source, to any other credit provider or any credit reporting agency for the purposes of providing or obtaining a credit reference, debt collection or notifying a default by the Customer.

22.2 Where the Customer is an individual the authorities under clause are authorities or consents for the purposes of the Privacy Act 1993.

22.3 The Customer shall have the right to request the Contractor for a copy of the information about the Customer retained by the Contractor and the right to request the Contractor to correct any incorrect information about the Customer held by the Contractor.

## Cancellation

23.1 The Contractor may cancel any contract to which these terms and conditions apply or cancel the Services at any time before the Services are commenced by giving written notice to the Customer. On giving such notice the Contractor shall repay to the Customer any sums paid in respect of the Price. The Contractor shall not be liable for any loss or damage whatever arising from such cancellation.

23.2 In the event that the Customer cancels the Services, then the Customer shall be liable for any loss incurred by the Contractor (including, but not limited to, any loss of profits) up to the time of cancellation.

## Personal Property Securities Act 1999 ("PPSA")

24.1 Upon assenting to these terms and conditions in writing the Customer acknowledges and agrees that:

- (a) these terms and conditions constitute a security agreement for the purposes of the PPSA; and
- (b) a security interest is taken in all Goods being transported by the Contractor.

24.2 The Customer undertakes to:

- (a) sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which the Contractor may reasonably require to register a financing statement or financing change statement on the Personal Property Securities Register;
- (b) indemnify, and upon demand reimburse, the Contractor for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register or releasing any Goods charged thereby;
- (c) not register a financing change statement or a change demand without the prior written consent of the Contractor.

24.3 The Contractor and the Customer agree that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to these terms and conditions.

24.4 The Customer waives its rights as a debtor under sections 116, 120(2), 121, 125, 126, 127, 129, 131 and 132 of the PPSA.

24.5 Unless otherwise agreed to in writing by the Contractor, the Customer waives its right to receive a verification statement in accordance with section 148 of the PPSA.

24.6 The Customer shall unconditionally ratify any actions taken by the Contractor under clauses to .

## Construction Contract Act 2002

25.1 The Customer hereby expressly acknowledges that:

(a) the Contractor has the right to suspend work within five (5) working days of written notice of its intent to do so if a payment claim is served on the Customer, and:

(i) the payment is not paid in full by the due date for payment and no payment schedule has been given by the Customer; or

(ii) a scheduled amount stated in a payment schedule issued by the Customer in relation to the payment claim is not paid in full by the due date for its payment; or

(iii) the Customer has not complied with an adjudicator's notice that the Customer must pay an amount to the Contractor by a particular date; and

(iv) the Contractor has given written notice to the Customer of its intention to suspend the carrying out of construction work under the construction contract.

(b) if the Contractor suspends work, it:

(i) is not in breach of contract; and

(ii) is not liable for any loss or damage whatsoever suffered, or alleged to be suffered, by the Customer or by any person claiming through the Customer; and

(iii) is entitled to an extension of time to complete the contract; and

(iv) keeps its rights under the contract including the right to terminate the contract; and may at any time lift the suspension, even if the amount has not been paid or an adjudicator's determination has not been complied with.

(a) if the Contractor exercises the right to suspend work, the exercise of that right does not:

(i) affect any rights that would otherwise have been available to the Contractor under the Contractual Remedies Act 1979; or

(ii) enable the Customer to exercise any rights that may otherwise have been available to the Customer under that Act as a direct consequence of the Contractor suspending work under this provision.

## General

26.1 If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.

26.2 These terms and conditions and any contract to which they apply shall be governed by the laws of New Zealand and are subject to the jurisdiction of the courts of New Zealand.

26.3 The Contractor shall be under no liability whatever to the Customer for any indirect loss and/or expense (including loss of profit) suffered by the Customer arising out of a breach by the Contractor of these terms and conditions.

26.4 In the event of any breach of this contract by the Contractor the remedies of the Customer shall be limited to damages. Under no circumstances shall the liability of the Contractor exceed the Price of the Services.

26.5 The Customer shall not be entitled to set off against or deduct from the Price any sums owed or claimed to be owed to the Customer by the Contractor.

26.6 The Contractor may license or sub-contract all or any part of its rights and obligations without the Customer's consent.

26.7 The Contractor reserves the right to review these terms and conditions at any time. If, following any such review, there is to be any change to these terms and conditions, then that change will take effect from the date on which the Contractor notifies the Customer of such change.

26.8 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, drought, storm or other event beyond the reasonable control of either party.

26.9 The failure by the Contractor to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect the Contractor's right to subsequently enforce that provision.