

# Ferguson's Transport Services Pty Ltd as Trustee for Ferguson Family Trust trading as South Side Crane Trucks and Regional Reinforcing – Contract Terms and Conditions of Service Engagement

## PREAMBLE

### 1 Preamble

1.1 All Services of Ferguson's Transport Services Pty Ltd trading as South Side Crane Trucks (SSCT) and Regional Reinforcing – ABN 83 611 679 759, whether gratuitous or not, are supplied subject to these Conditions and:

- (a) the provisions of Part I shall apply to the general provision of all and any Products and/or Services;
- (b) the provisions of Part II shall only apply to the carriage of Goods ("Services") by the Carrier for the Customer;
- (c) the provisions of Part III shall only apply to the supply of Products by way of sale by the Carrier to the Customer.

## PART I - GENERAL

### 2 Definitions

2.1 "Carrier" shall mean Ferguson's Transport Services Pty Ltd and its successors and assigns or any person acting on behalf of and with the authority of Ferguson's Transport Services Pty Ltd.

2.2 "Sub-Contractor" shall mean and include:

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

2.3 "Customer" means any person/s requesting the Carrier to provide the Services (or person/s acting on behalf of and with the authority of the Customer) as specified in any invoice, document or order, and if there more than one person requesting the Services is a reference to each person jointly and severally.

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

2.5 "Services" shall mean all services supplied by the Carrier to the Customer (including, but not limited to, anything done or to be done in relation to the Goods, or the provision of any services ancillary to the Goods such as moving, storing or leaving the Goods at any warehouse, yard, terminal, wharf or other place or area, loading or unloading the Goods from any vehicle, vessel or other conveyance, stowing or packing the Goods, or fumigating, transshipping, or otherwise handling the Goods, or anything else done in relation thereto), including the offering of any advice or recommendations and may include the provision of Products (as hereinafter defined).

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

2.7 "Dangerous Goods" means Goods so classified in the Dangerous Goods Code or which are or may become noxious, dangerous, hazardous, inflammable, explosive or damaging (including waste, contaminated or radioactive material, or capable of causing death, injury, or damage to any person or property whatsoever).

2.8 "Products" means all goods provided by the Carrier to the Customer at the Customer's request from time to time (and where the context so permits the term 'Products' shall be included in the term 'Services', as defined above).

2.9 "Price" shall mean the cost of the Services as agreed between the Carrier and the Customer subject to clause 4 of this contract.

### 3 Acceptance

3.1 The Customer is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Customer places an order for, or accepts Services provided by the Carrier.

3.2 These terms and conditions may only be amended with the Carrier's consent in writing and shall prevail to the extent of any inconsistency with any other document or agreement between the Customer and the Carrier.

3.3 These terms and conditions are to be read in conjunction with the Carrier's quotation and invoice

3.4 The Customer shall do anything necessary or desirable to give (and must not do anything which may prevent) full effect being given to this agreement.

3.5 These terms and conditions together with any printed on the reverse side hereof, contain the whole of the agreement between the Customer and the Carrier in relation to the provision of Services and any previous agreements are hereby negated.

3.6 None of the Carrier's agents or representatives are authorised to make any representations, statements, promise, warranty, conditions or agreements not expressed by the manager or the authorised representative of the Carrier in writing, nor is the Carrier bound by any such unauthorised statements.

3.7 Any time specified by the Carrier for provision of the Services is an estimate only and the Carrier will not be liable for any loss or damage incurred by the Customer as a result of any delay. However both parties agree that they shall make every endeavour to enable the Services to be provided at the time and place as was arranged between both parties. In the event that the Carrier is unable to provide the Services as agreed solely

due to any action or inaction of the Customer then the Carrier shall be entitled to charge a reasonable fee for re-providing the Services at a later time and date.

3.8 Any handling, installation, removal, assembly or erection of any kind included in the provision of the Services is undertaken on the basis that the Carrier accepts no liability whether in contract, tort, bailment or otherwise for any loss, damage or injury of any kind whatsoever, howsoever arising (including but not limited to, any negligence or breach of contract by the Carrier) caused or incurred or occurring during any part of such activity including any loss, damage or injury to any person, property or thing or any Goods.

## **4 Change in Control**

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

## **5 Price and Payment**

5.1 At the Carrier's sole discretion the Price shall be either;

(a) as indicated on invoices provided by the Carrier to the Customer in respect of Services provided; or

(b) Carrier's quoted Price which shall be binding upon the Carrier provided that the Customer shall either accept in writing the Carrier's quotation within thirty (30) days or by use of Service.

5.2 The Carrier reserves the right to change the Price:

(a) if a variation to the Carrier's quotation is requested or required (including as to the nature or quantity of the Products and/or Goods, nature and location of the collection and/or delivery address, facilities available for packing, loading or unloading, delivery times or date or otherwise, etc.);

(b) to reflect any increases to the Carrier in the cost of providing the Services which are beyond the reasonable control of the Carrier (including, without limitation, increases in the cost of labour or materials, foreign exchange fluctuations, or increases in taxes or customs duties or insurance premiums or warehousing costs);

(c) for any delay occurring other than from the Carrier's default.

5.3 Time for payment for the Services being of the essence, the Price will be payable by the Customer on the date/s determined by the Carrier, which may be:

(a) failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the Customer by the Carrier; or

(b) the date specified on any invoice or other form as being the date for payment; or

(c) thirty (30) days following the end of the month in which a statement is posted to the Customer's address or address for notices.

5.4 Payment may be made by electronic/on-line banking, or by any other method as agreed to between the Customer and the Carrier.

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

5.6 Receipt by the Carrier of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised, and until then the Carrier's ownership or rights in respect of the Services, and this agreement, shall continue.

5.7 Where the Customer requesting or organising the Carrier to provide the Services is acting on behalf of any third party, and that third party is intended to be responsible for the payment of the Price, then in the event that the third party does not pay for the Services when due, the Customer acknowledges that they shall be liable for the payment of the Price as if they had contracted for the provision of the Services on their own behalf.

## **6 Claims**

6.1 Notwithstanding clauses 17 and 19, in the event that the Client believes that they have any claim against the Carrier then they must lodge any notice of claim via email for consideration and determination by the Carrier within 48 hours of receipt of invoice

6.2 The failure to notify a claim within the time limits under clause 6.1, or the installation of the Products, is evidence of satisfactory performance by the Carrier of its obligations hereunder.

## **7 The Commonwealth Competition and Consumer Act 2010 and Fair Trading Acts**

7.1 Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the Commonwealth Competition and Consumer Act 2010 or the Fair Trading Act in each of the States and Territories of Australia (including any substitute to those Acts or re-enactment thereof), except to the extent permitted by those Acts where applicable.

## **8 Cancellation**

8.1 The Carrier may cancel any contract to which these terms and conditions apply or cancel the provision of the Services at any time before the Services are commenced (and/or the Products have been delivered) by giving written notice via email to the Customer. On giving such notice the Carrier shall repay to the Customer any sums

paid in respect of the Price. The Carrier shall not be liable for any loss or damage whatever arising from such cancellation.

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

## **9 Default and Consequences of Default**

9.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of one third of a percent (0.33%) per day (and at the Carrier's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.

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

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

9.4 Without prejudice to the Carrier's other remedies at law the Carrier shall be entitled to cancel all or any part of any order of the Customer which remains unperformed in addition to and without prejudice to any other remedies and all amounts owing to the Carrier shall, whether or not due for payment, become immediately payable in the event that:

- (a) any money payable to the Carrier becomes overdue, or in the Carrier'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
- (c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Customer or any asset of the Customer.

## **10 Personal Property Securities Act 2009 ("PPSA")**

10.1 In this clause financing statement, financing change statement, security agreement, and security interest has the meaning given to it by the PPSA.

10.2 Upon assenting to these terms and conditions in writing the Customer acknowledges and agrees that these terms and conditions constitute a security agreement for the purposes of the PPSA and creates a security interest in all:

- (i) Goods that have previously been carried and any Goods that will be carried in the future by the Carrier to the Customer; and/or
- (ii) collateral (account), being a monetary obligation of the Customer to the Carrier for Services that have previously been provided, and will be provided in the future by the Carrier to the Customer;
- (iii) Products that have previously been provided, and will be provided in the future by the Carrier to the Customer.

10.3 The Customer undertakes to:

- (a) promptly 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 Carrier may reasonably require to;
  - (i) register a financing statement or financing change statement in relation to a security interest on the Personal Property Securities Register;
  - (ii) register any other document required to be registered by the PPSA; or
  - (iii) correct a defect in a statement referred to in clause 10.3(a)(i) or 10.3(a)(ii);
- (b) indemnify, and upon demand reimburse, the Carrier for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register established by the PPSA or releasing any registration made thereby;
- (c) not register a financing change statement in respect of a security interest without the prior written consent of the Carrier;
- (d) not register, or permit to be registered, a financing statement or a financing change statement in relation to the Goods, Products and/or collateral (account) in favour of a third party without the prior written consent of the Carrier.

10.4 The Carrier and the Customer agree that sections 96, 115 and 125 of the PPSA do not apply to the security agreement created by these terms and conditions.

10.5 The Customer waives their rights to receive notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA.

10.6 The Customer waives their rights as a grantor and/or a debtor under sections 142 and 143 of the PPSA.

10.7 Unless otherwise agreed to in writing by the Carrier, the Customer waives their right to receive a verification statement in accordance with section 157 of the PPSA.

10.8 The Customer must unconditionally ratify any actions taken by the Carrier under clauses 10.3 to 10.5.

10.9 Subject to any express provisions to the contrary nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.

## 11 Privacy Act 1988

11.1 The Customer agrees for the Carrier to obtain from a credit reporting body (CRB) a credit report containing personal credit information (e.g. name, address, D.O.B, occupation, previous credit applications, credit history) about the Customer in relation to credit provided by the Carrier.

11.2 The Customer agrees that the Carrier may exchange information about the Customer with those credit providers and with related body corporates for the following purposes:

- (a) to assess an application by the Customer; and/or
- (b) to notify other credit providers of a default by the Customer; and/or
- (c) to exchange information with other credit providers as to the status of this credit account, where the Customer is in default with other credit providers; and/or
- (d) to assess the creditworthiness of the Customer including the Customer's repayment history in the preceding two years.

11.3 The Customer consents to the Carrier being given a consumer credit report to collect overdue payment on commercial credit.

11.4 The Customer agrees that personal credit information provided may be used and retained by the Carrier for the following purposes (and for other agreed purposes or required by):

- (a) the provision of Services; and/or
- (b) analysing, verifying and/or checking the Customer's credit, payment and/or status in relation to the provision of Services; and/or
- (c) processing of any payment instructions, direct debit facilities and/or credit facilities requested by the Customer; and/or
- (d) enabling the collection of amounts outstanding in relation to the Services.

11.5 The Carrier may give information about the Customer to a CRB for the following purposes:

- (a) to obtain a consumer credit report;
- (b) allow the CRB to create or maintain a credit information file about the Customer including credit history.

11.6 The information given to the CRB may include:

- (a) personal information as outlined in 11.1 above;
- (b) name of the credit provider and that the Carrier is a current credit provider to the Customer;
- (c) whether the credit provider is a licensee;
- (d) type of consumer credit;
- (e) details concerning the Customer's application for credit or commercial credit (e.g. date of commencement/termination of the credit account and the amount requested);
- (f) advice of consumer credit defaults, overdue accounts, loan repayments or outstanding monies which are overdue by more than sixty (60) days and for which written notice for request of payment has been made and debt recovery action commenced or alternatively that the Customer no longer has any overdue accounts and the Carrier has been paid or otherwise discharged and all details surrounding that discharge (e.g. dates of payments);
- (g) information that, in the opinion of the Carrier, the Customer has committed a serious credit infringement;
- (h) advice that the amount of the Customer's overdue payment is equal to or more than one hundred and fifty dollars (\$150).

11.7 The Customer shall have the right to request (in writing) from the Carrier:

- (a) a copy of the information about the Customer retained by the Carrier and the right to request that the Carrier correct any incorrect information; and
- (b) that the Carrier does not disclose any personal information about the Customer for the purpose of direct marketing.

11.8 The Carrier will destroy personal information upon the Customer's request (in writing) or if it is no longer required unless it is required in order to fulfil the obligations of this agreement or is required to be maintained and/or stored in accordance with the law.

11.9 The Customer can make a privacy complaint by contacting the Carrier (in writing). The Carrier will respond to that complaint within seven (7) days of receipt and will take all reasonable steps to make a decision as to the complaint within thirty (30) days of receipt of the complaint. In the event that the Customer is not satisfied with the resolution provided, the Customer can make a complaint to the Information Commissioner at [www.oaic.gov.au](http://www.oaic.gov.au).

## 12 General

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

12.2 These terms and conditions and any contract to which they apply shall be governed by the laws of Western Australia, the state in which the Carrier has its principal place of business, and are subject to the jurisdiction of the courts in that state.

12.3 Subject to clause 7, the Carrier shall be under no liability whatsoever to the Customer for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Customer arising out of a breach by

the Carrier of these terms and conditions (alternatively the Carrier's liability shall be limited to damages which under no circumstances shall exceed the Price).

12.4 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 Carrier nor to withhold payment of any invoice because part of that invoice is in dispute.

12.5 The Customer agrees that the Carrier may amend these terms and conditions at any time. If the Carrier makes a change to these terms and conditions, then that change will take effect from the date on which the Carrier notifies the Customer of such change. The Customer will be taken to have accepted such changes if the Customer makes a further request for the Carrier to provide Services to the Customer.

12.6 Where the Carrier is unable, wholly or in part, by reason of any fact, circumstance, matter or thing beyond the reasonable control of the Carrier, including but not limited to any act of God, war, terrorism, strike, civil commotion, lock-out, general or partial stoppage, restraint of labour, industrial action, fire, flood, storm, etc. ("**Force Majeure**") to carry out any obligation under this agreement and the Carrier gives the Customer prompt notice of such Force Majeure with reasonably full particulars thereof and, insofar as is known, the probable extent to which it will be unable to perform or be delayed in performing that obligation and uses all reasonable diligence to negate or remove that Force Majeure as quickly as possible, that obligation is suspended, so far as it is affected by Force Majeure, during the continuance thereof. The requirement that any Force Majeure shall be negated or removed with all reasonable diligence shall not require the settlement of strikes, lockouts or other labour disputes, or claims or demands by any government on terms contrary to the wishes of the Carrier.

12.7 The Customer warrants that it has the power to enter into this agreement and has obtained all necessary authorisations to allow it to do so, it is not insolvent and that this agreement creates binding and valid legal obligations on it.

## **PART II – CARRIAGE OF GOODS**

### **13 Provision of the Services**

13.1 The Carrier is not a "Common Carrier" and will accept no liability as such. All articles are carried or transported and all storage and other services are performed by the Carrier subject only to these conditions and the Carrier 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.

13.2 The Customer authorises the Carrier (in its discretion at any time without notice to the Customer) to:

(a) license or sub-contract all or any part of its rights and/or obligations, including using the services of others where necessary to ensure safety of other road users and property and/or compliance with lawful authority requirements and/or Police or private escorts, road closures and/or transport control, and using specialist equipment such as special cooling, etc.;

(b) deviate from the usual, customary, intended or advertised route (whether or not the nearest and/or most direct and/or customary) or manner of carriage of Goods that may be deemed reasonable or necessary in the circumstances, including stay at any place whatsoever once or more often in any order backwards or forwards and/or store the Goods at any such place for any period whatsoever;

(c) comply with any order direction or recommendation on loading, unloading, departure, routes, place or call, stoppages, destination, arrival, discharge, delivery or otherwise whatsoever given by any lawful authority.

13.3 The Customer acknowledges and agrees:

(a) the Carrier contracts with the Customer both on its own behalf and on the behalf of the Carrier's servants, agents and subcontractors, and the Customer undertakes that the Customer will not make any claims against such servant, agent or subcontractor which may impose upon any of them any liability whatsoever in connection with the Goods or the provision of the Services, whether or not arising out of negligence or a wilful act or omission by any of them;

(b) in respect of any clause herein which excludes, or in any way limits, the liability of the Carrier in respect of the Services, the Carrier, in addition to acting for itself, is acting as an agent of, and trustee for, each of its employees and also any other person or company with whom the Carrier arranges for the carriage of the Goods (and the employees of such person or company) so that these parties are parties to this agreement in so far as to the exclusions or indemnities that are contained herein are concerned and, in so far as may be necessary to give effect to this clause, the Carrier will hold the benefit of these terms and conditions for its employees and so any such person or company and their employees;

(c) the Customer shall indemnify the Carrier against:

(i) the consequences of such claim or allegation thereof;

(ii) all claims or demands whatsoever by whomsoever made in respect of any loss, damage, or injury howsoever caused whether or not by negligence or wilful act or omission of the Carrier, its servants, agents or subcontractors.

13.4 The Carrier's charges shall be considered earned in the case of Goods for carriage as soon as the Goods are loaded and despatched from the senders/consignor's premises.

13.5 In addition to clause 5.2, the Carrier reserves the right to change the Price where the Price is calculated by weight, measurement or value, the Carrier 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.

13.6 Should the Customer require the Carrier to collect the Goods upon the Customer's behalf from a third party, any receipt the Carrier may give that third party when effecting collection is no more than a record of the collection and cannot be construed as confirmation of the quality or condition of the Goods.

## **14 Customer-Packed Containers**

14.1 The Carrier may open at the Customer's risk and expense any document or any packaging or container in which the Goods are placed or carried to inspect the Goods to determine their nature or condition or to determine their ownership or destination where any consignment note or identifying mark is lost, damaged, destroyed, defaced or otherwise.

14.2 Subject to any written special instructions to the contrary:

(a) the Customer and/or consignor is solely responsible for the safe and proper packaging of the Goods (including the manner in which the Goods have been packed, the suitability of the Goods for carriage or manner or packaging and/or the condition of the packaging, etc.) and for any loss suffered or incurred by any person (including the Customer) through any such failure;

(b) the Carrier is not obliged to pack the Goods or to provide any plant, power or labour required for loading and/or unloading of the Goods.

14.3 Goods requiring special appliances for loading and/or unloading are accepted for carriage only on condition that such appliances are made available by the Customer at the collection and/or delivery address. If the Carrier is, without prior arrangement, called upon to load and/or unload such Goods, the Carrier shall not be liable to the Customer for any loss whatever, howsoever caused, arising out of such loading and/or unloading and the Customer shall indemnify the Carrier against all claims and demands whatsoever which could not have been made if such assistance had not been given.

## **15 Dangerous Goods**

15.1 Unless otherwise agreed in advance in writing with the Carrier the Customer or their authorised agent shall not tender for carriage any Dangerous Goods, nor anything which may encourage vermin or pests. The Customer shall be liable for and hereby indemnifies the Carrier for all loss and damage and all additional charges and expenses incurred or sustained by the Carrier arising out of the carriage of the Goods, any false, misleading or inaccurate information or description of such Dangerous Goods, or any default or failure of the Customer to declare the Goods and Dangerous Goods and provide full particulars thereof.

15.2 Where Dangerous Goods and/or anything likely to encourage vermin or pests are accepted for carriage the Customer and/or Consignor warrants that the carriage thereof is not prohibited and they have fully disclosed in writing to the Carrier before the Carrier has taken possession of the Goods the full particulars and description of the Goods, the nature and value of the Goods, all requirements of lawful authorities for such carriage and all other relevant information.

15.3 The Carrier may, at its discretion, at the Customer's expense and without compensation thereto or to any other person with an interest in the Goods and without prejudice to its charges or any other rights hereunder:

(a) remove, sell, destroy or otherwise dispose of any undeclared Dangerous Goods in its possession without being responsible or accountable for the value thereof to the Customer or any other person with an interest thereto;

(b) dispose of or destroy or abandon or render harmless any Goods which the Carrier believes have deteriorated or become objectionable, unwholesome, infested with vermin or pests, or a source of danger or contamination, or any declared Dangerous Goods which are or are liable to become of a dangerous, inflammable, explosive, volatile, offensive or damaging nature.

## **16 Customer's Responsibility**

16.1 The Customer expressly warrants to the Carrier that:

(a) 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 agreement, and by entering into this agreement the Customer accepts these terms and conditions for the Consignee as well as for all other persons on whose behalf the Customer is acting;

(b) the person handing over the Goods to the Carrier is authorised to sign and accept these terms and conditions;

(c) it is the Customer's sole responsibility to address adequately each consignment and to provide written delivery instructions to enable effective delivery;

(d) any packaging, labelling and/or marking by the Customer accurately describes the Goods as to content, weight and method of handling or otherwise, complies with applicable dangerous goods codes, any other applicable laws and with any relevant Australian or international standards;

(e) the Goods will be suitably organised and will be fit for carriage.

16.2 The Customer shall indemnify the Carrier against any loss (including any fine, levy, charge or other monetary imposition to which the Carrier may become liable incidental to the carriage) damage, death or injury, including loss or damage to the Carrier's containers and/or equipment arising out of:

(a) the Customer's unreasonable detention of any vehicle container or other equipment of the Carrier;

(b) any breach of the Customer's warranties under clause 16.1, including the failure to comply with clause 16.1(d).

## **17 Insurance**

17.1 The Carrier will not, without the Customer's written instruction, insure the Goods, and:

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

(b) subject to sub-clause (c):

- (i) the Carrier 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;
- (ii) under no circumstances will the Carrier be under any liability with respect to the arranging of any such insurance and no claim will be made against the Carrier for failure to arrange or ensure that the Goods are insured adequately or at all.
- (c) any such insurance is at the Customer's own expense. Where the Customer's instruction does not specify the class of insurance to be effected, the Carrier may in its discretion effect that class of insurance which it considers appropriate. Such insurance shall exclude all claims resultant from:
  - (i) wear, tear, moths, vermin, damp, mildew or loss of market;
  - (ii) loss, damage or expensed proximately caused by delay;
  - (iii) strikes, riots, civil commotions or malicious damage of the insured Goods;
  - (iv) gradual deterioration, rust or oxidisation unless due to or consequent upon fire, collision, overturning or other accident;
  - (v) any exclusion common to that class of insurance;
  - (vi) any other exclusion advised by the Customer to the Carrier, detailed in the special instructions.

## **18 Delivery of the Goods**

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

18.2 The Carrier 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.

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

18.4 If the Customer requests the Carrier to leave Products outside the Carrier's premises for collection or to deliver the Products to an unattended location then such Products shall be left at the Customer's sole risk.

## **19 Loss or Damage**

19.1 Subject to clause 7 and any statutory provisions imposing liability in respect of the loss of or damage to the Goods, the Carrier shall not be under any liability for:

- (a) any delay or any loss or damage to the Goods occasioned during carriage arising from any Force Majeure or any confiscation, requisition, destruction of or damage by order of any authority, or seizure under legal process;
- (b) compliance with the directions of any person or lawful authority entitled to give them;
- (c) deterioration, contamination (including any contamination of any grain or other cargo compromising the Goods), evaporation, breakdown or malfunction of any refrigeration or cooling equipment, wrongful delivery, misdelivery, delay in delivery or non-delivery of the Goods whenever or howsoever occurring (and whether the Goods are or have been in the possession of the Carrier or not)
- (d) 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
- (e) any act or omission whether wilful, reckless, negligent or otherwise of the Carrier, or its servants or agents or subcontractors;
- (f) any latent defect or inherent vice or natural deterioration or wastage of the Goods or packaging;
- (g) any act, omission or neglect of the Customer, including insufficient or improper packaging, labelling or addressing, or failure to take delivery, or any handling, loading, storage or unloading of the Goods.

## **20 Lien**

20.1 The Carrier shall have a lien on any Goods owned by the Customer and in the possession or control of the Carrier (and any documents relating to those Goods) for all sums payable by the Customer to the Carrier, and the Carrier shall have the right to sell such Goods or cargo by public auction or private treaty after giving seven (7) days' notice to the Customer. The Carrier 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. Any such sale shall not prejudice or affect the Carrier's right to recover from the Customer any charges due or payable in respect of the carriage or such detention and sale.

## **PART III – SUPPLY OF PRODUCTS**

### **22 Provision and Delivery of the Products**

22.1 Provision of the Products is subject to the Carrier having an adequate stock thereof at the time of receipt by the Carrier of the Customer's order.

22.2 Orders for Products made to the Customer's specifications, for non-stocklist items or Products specially procured for the Customer:

- (a) a non-refundable deposit of twenty-five percent (25%) of the Price shall be required;
- (b) any cancellation thereof must be made in writing to the Carrier.

22.3 Delivery of the Products shall be made to road-side only, and any delivery point beyond this shall be at the Customer's sole responsibility and risk.

22.4 The Customer must inspect the Products immediately upon delivery (and prior to installation) must notify the Carrier in writing of any evident defect/damage, shortage in quantity, or failure to comply with the description or quote within the requirements under clause 6. The Customer must notify any other alleged defect in the Products as soon as reasonably possible after any such defect becomes evident. Upon such notification the Customer must allow the Carrier to inspect the Products.

## **23 Risk**

23.1 Risk of damage to or loss of the Products passes to the Customer on delivery and the Customer must insure the Products on or before delivery.

23.2 If any of the Products are damaged or destroyed following delivery but prior to ownership passing to the Customer, the Carrier is entitled to receive all insurance proceeds payable for the Products. The production of these terms and conditions by the Carrier is sufficient evidence of the Carrier's rights to receive the insurance proceeds without the need for any person dealing with the Carrier to make further enquiries.

23.3 If the Customer requests the Carrier to leave Products outside the Carrier's premises for collection or to deliver the Products to an unattended location then such Products shall be left at the Customer's sole risk.

## **24 Title**

24.1 The Carrier and the Customer agree that ownership of the Products shall not pass until:

- (a) the Customer has paid the Carrier all amounts owing for the particular Products; and
- (b) the Customer has met all other obligations due by the Customer to the Carrier in respect of all contracts between the Carrier and the Customer.

24.2 It is further agreed that:

- (a) until ownership of the Products passes to the Customer in accordance with clause 24.1 that the Customer is only a bailee of the Products and must return the Products to the Carrier on request.
- (b) the Customer holds the benefit of the Customer's insurance of the Products on trust for the Carrier and must pay to the Carrier the proceeds of any insurance in the event of the Products being lost, damaged or destroyed.
- (c) the Customer must not sell, dispose, or otherwise part with possession of the Products other than in the ordinary course of business and for market value. If the Customer sells, disposes or parts with possession of the Products then the Customer must hold the proceeds of any such act on trust for the Carrier and must pay or deliver the proceeds to the Carrier on demand.
- (d) the Customer should not convert or process the Products or intermix them with other goods but if the Customer does so then the Customer holds the resulting product on trust for the benefit of the Carrier and must sell, dispose of or return the resulting product to the Carrier as it so directs.
- (e) the Customer irrevocably authorises the Carrier to enter any premises where the Carrier believes the Products are kept and recover possession of the Products.
- (f) the Carrier may recover possession of any Products in transit whether or not delivery has occurred.
- (g) the Customer shall not charge or grant an encumbrance over the Products nor grant nor otherwise give away any interest in the Products while they remain the property of the Carrier.
- (h) the Carrier may commence proceedings to recover the Price of the Products sold notwithstanding that ownership of the Products has not passed to the Customer.

## **25 Defects, Warranties and Returns**

25.1 Subject to this clause 7, returns will only be accepted provided that:

- (a) the Customer has complied with the provisions of clause 6; and
- (b) the Carrier has agreed that the Products are defective; and
- (c) the Products are returned within a reasonable time at the Customer's cost (if that cost is not significant); and
- (d) the Products are returned in as close a condition to that in which they were delivered as is possible.

25.2 Notwithstanding clauses 6 and 7, but subject to the CCA, the Carrier shall not be liable for any defect or damage which may be caused or partly caused by or arise as a result of:

- (a) the Customer failing to properly maintain or store the Products;
- (b) the Customer using the Products for any purpose other than that for which they were designed;
- (c) the Customer continuing the use of the Products after any defect became apparent or should have become apparent to a reasonably prudent operator or user;
- (d) the Customer failing to follow any instructions or guidelines provided by the Carrier;
- (e) fair wear and tear, any accident, or act of God.

25.3 The Carrier may in its absolute discretion accept non-defective Products for return in which case the Carrier may require the Customer to pay handling fees of up to twenty-five percent (25%) of the value of the returned Products plus any freight and Delivery costs.



25.4 Notwithstanding anything contained in this clause if the Carrier is required by a law to accept a return then the Carrier will only accept a return on the conditions imposed by that law.

## **26 Intellectual Property**

26.1 Where the Carrier has designed, drawn or developed Products for the Customer, then the copyright in any designs and drawings and documents shall remain the property of the Carrier.