

TERMS AND CONDITIONS OF TRADE – GOODS

1. Definitions

In these Terms and Conditions of Trade:

"Account" means the Customer's account with the Vendor.

"Customer" means the person or entity making the application you or any person acting with ostensible authority on behalf of the Customer.

"Goods" means goods supplied by the Vendor to the Customer at any time.

"Guarantor" means any party executing a guarantee of the Account with the Vendor.

"Order" or "Orders" means the order or orders of the Customer to the Vendor to supply Goods.

"PPSA" means the Personal Property Securities Act 1999

"Vendor" means Harvey Wholesale Limited

2. Orders

Orders will be on such forms as the Vendor may require from time to time.

3. Acceptance

Each Order shall constitute acceptance by the Customer of these Terms and Conditions of Trade.

4. Prices

Prices are subject to change without notice. All Orders will be charged at prices prevailing at the date of delivery of the Goods.

5. Delivery

Where the Order makes provision for delivery then delivery shall take place at the place stated in the Order. If no place is indicated then delivery shall be made at the physical address of the Customer set out in the application.

6. Access for Installation

(a) The Customer shall provide for the purposes of installation at no cost to the Vendor, all necessary facilities including power, lighting, unloading, hoisting and lifting facilities, labour, site preparation and employee amenities which comply with the statutory requirements.

(b) Upon the Vendor delivering Goods the Customer shall ensure adequate safe storage facilities are provided for protection against theft and damage at no cost to the Vendor.

(c) The Customer acknowledges that it solely shall be responsible for arranging and providing convenient access for the Goods to be delivered to the proposed place of installation including but not limited to access thereto by way of stairs, lift or crane as the case may require.

(d) If the Customer fails to supply convenient access then the Vendor may make a further charge to the Customer to cover the additional costs it incurs arising from such failure as the Vendor considers reasonable.

(e) If the Customer is not in a position to accept or take delivery of the Goods as scheduled the Customer shall be responsible for storage charges and any additional charges caused thereby.

(f) Where installation or supply of the Goods is required of the Vendor by the Customer and installation or supply is required to be co-ordinated with other trades the Customer shall provide the Vendor with a schedule detailing all relevant information relating to installation or supply with sufficient time allowed for the Vendor to meet delivery or supply dates.

(g) The delivery or supply period shall be extended to cover delays caused by strikes, lockouts, prohibitions, non-availability of materials or any circumstances beyond the Vendor's control.

7. Health and Safety in Employment Act 1992

The Vendor shall be responsible for the actions of its employees in terms of section 15 of the Health and Safety in Employment Act 1992 ("HSEEA"). The Customer shall be responsible for compliance with the HSEEA in respect of the Customer's site and shall advise the Vendor prior to commencement of any work of any hazards on the Customer's site.

8. Time of Performances

Time shall in no case be of the essence. The Vendor shall not be responsible for any delay in delivery of the Goods and the Customer shall not be entitled to cancel orders because of any such delay. Dates for delivery are given in good faith and are not to be treated as a condition of sale or purchase. Delivery by the Vendor to a carrier is deemed to be delivery to the Customer.

9. Terms of Payment

(a) Unless otherwise specified, payment for all Goods shall be made no later than the 20th day of the month following supply.

(b) Interest will accrue on all amounts overdue at the rate of [2.5%] per month and will be calculated on a day by day basis until payment is made in full.

(c) All costs of or incurred by the Vendor as a result of a default by the Customer including but not limited to debt collections costs and legal costs as between solicitor and client shall be met by the Customer.

(d) If the Customer defaults in any payment or commits any act of bankruptcy or any act which would render it liable to be wound up or if a resolution is passed or proceedings are filed for the winding up of the Customer or if a receiver is appointed for all or any assets of the Customer, the Vendor may cancel any Order without prejudice to any other rights it may have and payment for all completed Orders shall immediately become due.

10. Quotation

Where a quotation is given by the Vendor for the supply of Goods:

(a) unless otherwise agreed the quotation shall be valid for thirty (30) days from the date of issue;

(b) the quotation shall be exclusive of Goods and Services Tax unless specifically stated to the contrary;

(c) the Vendor reserves the right to alter the quotation because of circumstances beyond its control.

11. Taxes and Duties

Unless expressly included in any quotation given by the Vendor, Goods and Services Tax and other taxes and duties assessed or levied in connection with the supply of the Goods to the Customer are not included in the price and shall be the responsibility of the Customer or, where the payment of such taxes or duties is the responsibility of the Vendor at law, the price shall be increased by the amount of such taxes or duties.

12. Payment Allocation

The Vendor may in its discretion allocate any payment received from the Customer towards any invoice that the Vendor determines and may do so at the time of receipt or at any time afterwards. On any default by the Customer the Vendor may re-allocate any payments previously received and allocated. In the absence of any payment allocation by the Vendor, payment shall be deemed to be allocated in such manner as preserves the maximum value of the Vendor's purchase money security interest in the products.

13. Errors or Omissions

Clerical errors or omissions, whether in computation or otherwise in the quotation, acknowledgement or invoice shall be subject to correction.

14. Risk

From the time of dispatch to the Customer by the Vendor, risk in all Goods supplied shall pass to the Customer and any loss, damage or deterioration to the Goods shall be borne by the Customer. The Customer shall notwithstanding any loss, damage or deterioration to the Goods remain liable to pay for the Goods.

15. Ownership/General Lien

(a) The Vendor shall retain ownership of all Goods supplied until it receives payment in full of all amounts owing by the Customer for all Orders.

(b) If any of the Goods are incorporated in or used as material for other goods before payment is made ownership in the whole of the other goods shall be and remain with the Vendor until payment is made. The Vendor's Security Interest in the Goods shall continue in the terms of section 82 of the PPSA.

(c) The Vendor shall have a right to stop and retrieve the Goods in transit whether or not ownership has passed.

16. Ownership

Until payment is made by the Customer, the Customer agrees to:

(a) ensure the Goods are readily identifiable at all times as the property of the Vendor;

(b) hold the Goods as trustee for the Vendor and deal with the Goods for and on behalf of the Vendor (but will not hold the Customer out as an agent to any third parties);

(c) if the Goods are re-sold, the proceeds of re-sale will belong to the Vendor and the Customer will keep the proceeds of sale in a separate account for which separate records are kept.

17. Merger with Other Goods

If the Goods are attached, fixed or incorporated into any property of the Customer, by way of any manufacturing or assembly process by the Customer or any third party or otherwise, title in the products and services shall remain with the Vendor until the Customer has made payment for all Goods and where those Goods are mixed with other property so as to be part of or constitute of any new goods those new goods shall be deemed to be assigned to the Vendor as security for the full satisfaction by the Customer of the full amount owing by the Customer to the Vendor.

18. Export Prohibition

(a) The Goods provided pursuant to these Terms and Conditions of Trade are sold for use in New Zealand only and are not to be exported elsewhere, directly or indirectly, without prior agreement of the Vendor.

(b) In the event that the Vendor consents to the export of the Goods the Customer is responsible for all costs and compliance with any export regulations in force within the country for which the Goods are destined.

19. Recovery of Goods

(a) In the event of non-payment or if payment of the Customer's Account is overdue the Vendor shall be entitled without prejudice to any right it has at law or in equity to enter the place where the Goods are stored whether the Customer's premises or property or the premises or property of a third party for the purpose of recovering and taking possession of the Goods supplied.

(b) The Customer warrants to the Vendor that where the Goods are stored on the premises or property of a third party the Customer is acting as agent for the third party and has the full authority of the third party to authorise entry on to the premises or property of the third party for the purpose of recovering the Goods without releasing the Customer from liability.

(c) The Vendor will not be responsible for any damage reasonably caused in the course of recovering and taking possession of the Goods supplied to the Customer or a third party and the Customer indemnifies the Vendor in respect of damage caused in the removal of the Goods from the property of a third party.

(d) The Vendor may resell the Goods and apply the proceeds towards payment of the Customer's outstanding Account with the Vendor. Any shortfall will remain the liability of the Customer. The Customer indemnifies the Vendor for all costs and expenses including legal costs as between solicitor and client which the Vendor may incur in recovering the Goods and any monies owed to it.

20. Warranties

(a) The Vendor gives no warranty express or implied as to the quality, description or fitness for any particular purpose of the Goods.

(b) Where applicable, manufacturer's warranties will attach to the Goods.

(c) Where the Consumer Guarantees Act 1993 applies the Customer shall have all the rights and remedies provided under this Act but not others. The Customer warrants to the Vendor that any Goods supplied by the Vendor under any order with the Vendor are being acquired by the Customer for the purpose of its business and the Consumer Guarantees Act 1993 does not apply to the supply of those Goods.

(d) Where Goods supplied are defective in terms of any condition warranty or guarantee or otherwise do not conform to the Order, the Vendor at its discretion replace or repair any faulty Goods or pay the cost of replacing them, but only if a claim is made by the Customer within seven days of delivery of the Goods time being of the essence.

21. Compliance

The Customer shall be solely responsible for obtaining any necessary permits under and for compliance with all legislation, regulations, by-laws or rules having the force of law in connection with the installation and operation of the Goods.

22. Returns

The Customer shall not be entitled to return the Goods or cancel an Order other than as allowed pursuant to these Terms and Conditions of Trade.

23. Personal Property Securities Act 1999

(a) The Customer hereby acknowledges that these Terms and Conditions of Trade constitute a security agreement which creates a security interest in favour of all Goods supplied by the Vendor to the Customer (or for the Customer's account) and all after-acquired Goods supplied by the Vendor to the Customer (or for the Customer's account) to secure the payment from time to time and at a time, including future advances. The Customer agrees to grant a "Purchase Money Security Interest" to the Vendor, as that term is defined in the PPSA.

(b) The Customer acknowledges and agrees that by assenting to these terms the Customer grants a security interest (by virtue of the retention of title clause in these Terms and Conditions of Trade) to the Vendor and all Goods previously supplied by the Vendor to the Customer (if any) and all after-acquired Goods supplied by the Vendor to the Customer's account) and these terms shall apply notwithstanding anything express or implied to the contrary contained in the Customer's purchase order.

(c) The Customer undertakes to:

(i) sign any further documents and/or provide any further information (which information the Customer warrants to be complete, accurate and up-to-date in all respects) which the Vendor may reasonably require to enable registration of a financing statement or financing change statement on the Personal Property Securities Register ("PPSR");

(ii) not register a financing change statement as defined in section 135 of the PPSA or make a demand to alter the financing statement pursuant to section 162 of the PPSA in respect of the Goods without the prior written consent of the Vendor;

(iii) give the Vendor not less than 14 days' prior written notice of any proposed change in the Customer's name and/or any other changes in the Customer's details (including but not limited to changes in the Customer's address, facsimile number, email address, trading name or business practice);

(iv) pay all costs incurred by the Vendor in registering and maintaining a financing statement (including registering a financing change statement) on the PPSR and/or enforcing or attempting to enforce the security interest created by these Terms and Conditions of Trade including executing subordination agreements; and

(v) be responsible for the full costs incurred by the Vendor (including actual legal fees and disbursements on a solicitor and client basis) in obtaining an order pursuant to section 167 of the PPSA.

(vi) The Customer waives any rights it may have under sections 116, 119, 120(2), 121, 125, 126, 127, 129, 131 and 132 of the PPSA upon enforcement.

(d) Pursuant to section 148 of the PPSA, unless otherwise agreed to in writing by the Vendor, the Customer waives the right to receive the verification statement in respect of any financing statement or financing change statement relating to the security interest.

(e) The maximum permitted by law, the Customer waives its rights and, with the Vendor's agreement, contracts out of its rights under sections referred to in sections 107(2), 8(e) and (g) to (l) of the PPSA.

(f) The Customer agrees that nothing in section 113, 114(1)(a), 117(1)(c), 133 and 134 of the PPSA shall apply to these terms, and, with the Vendor's agreement, contracts out of such sections.

(g) The Customer and the Vendor agree that section 109(1) of the PPSA is contracted out of in respect of particular Goods if and only for as long as the Vendor is not the secured party with priority over all other secured parties in respect of those Goods;

(h) The Customer agrees that immediately on request by the Vendor the Customer will procure from any persons considered by the Vendor to be relevant to its security position such agreement and waivers as the Vendor may at any time require.

24. Events of Default

All payments shall become immediately due to the Vendor and the Vendor may at its option suspend or terminate these Terms and Conditions of Trade and/or exercise any of the remedies available to it under these Terms and Conditions of Trade in the event that:

(a) a receiver is appointed over any of the assets or undertaking of the Customer;

(b) an application for the appointment of a liquidator is filed against the Customer which remains unsatisfied for a period of 10 days, or any of the conditions necessary to render the Customer liable to have a liquidator exist, or a liquidator is appointed;

(c) the Customer goes into voluntary liquidation, amalgamates with another company or acquires its own shares in accordance with the Companies Act 1993;

(d) the Customer suspends payments to its creditors or makes or attempts to make an arrangement or compromise with its creditors;

(e) the Customer becomes insolvent within the meaning of the Insolvency Act 1967 or is, becomes, or is presumed to be unable to pay its debts which fall due as defined in section 287 of the Companies Act 1993 or section 261 of the Companies Act 1955; or commits any act of bankruptcy.

25. Authority to Sell Goods Supplied

Notwithstanding that title in all Goods is retained by the Vendor, the Customer is authorised to sell the Goods in the ordinary course of business provided that the authority may be terminated by written notice if the Vendor consents the credit of the Customer to be unsatisfactory or if the Customer is in default in the performance of its obligations to the Vendor and shall be deemed automatically revoked if the Customer commits any act of bankruptcy or any act which would render it liable to be wound up or if a resolution is passed or proceedings are filed for the winding up of the Customer or a receiver is appointed for all or any assets of the Customer.

26. Sale of Goods Supplied

(a) Where Goods in respect of which property has not passed to the Customer are sold by the Customer in the ordinary course of business, the book debt created on the sale and the proceeds of sale when received shall be held by the Customer for the Vendor in terms of section 45 of the PPSA.

(b) Where any proceeds of sale are placed in the Customer's bank account the funds in the Customer's bank account shall be deemed to be held on trust for the Vendor to the extent of proceeds of sale.

(c) Where any payments are made from the Customer's bank account otherwise than to the Vendor payment shall be deemed to have been made from other funds in the Customer's bank account and not from funds held on trust for the Vendor.

(d) The trust obligation imposed by this clause and the Vendor's entitlements under the PPSA shall continue for so long as the Vendor is unpaid for all Goods supplied to the Customer.

27. Security Interest

The Customer gives the Vendor a Security Interest in all of the Customer's present and after-acquired property (including Goods and materials supplied or financed by the Vendor have been attached or incorporated).

28. Security

Without prejudice to such other rights as the Vendor may have pursuant to these Terms and Conditions of Trade, the Vendor reserves the right to request from the Customer such security as the Vendor may from time to time think desirable to secure to the Vendor all sums due to the Vendor and may refuse to supply further Goods to the Customer until such security is given.

29. Liability

(a) The Vendor's liability to the Customer shall be limited to the value of the Order supplied.

(b) The Sale of Goods Act 1908, the Fair Trading Act 1986 and other statutes may imply warranties or conditions or impose obligations upon the Vendor which cannot by law (or which can only to a limited extent by law) be excluded or modified. In respect of any such implied warranties, conditions or terms imposed on the Vendor the Vendor's liability shall, where it is allowed, be excluded or if not able to be excluded only apply to the minimum extent required by the relevant statute.

(c) Except as otherwise provided above the Vendor shall not be liable for any loss or damage of any kind whatsoever, arising from the supply of Goods by the Vendor to the Customer including consequential loss whether suffered or incurred by the Customer or another person and whether in contract or tort (including negligence) or otherwise and irrespective of whether such loss or damage arises directly or indirectly from Goods provided by the Vendor to the Customer.

(d) The Customer shall indemnify the Vendor against all claims and loss of any kind whatsoever however caused or arising and without limiting the generality thereof the foregoing of this clause whether caused or arising as a result of the negligence of the Vendor or otherwise, brought by any person in connection with any matter, act, omission, or error by the Vendor its agents or employees in connection with the Goods.

30. Copyright And Intellectual Property

(a) Unless it is specifically agreed in writing to the contrary, the Vendor retains all intellectual property rights, including copyright, patents, registered designs, and trademarks, and all other intellectual property rights in respect of any Goods provided by the Vendor for to the Customer.

(b) The Customer will at all times keep the Vendor advised of any infringement or potential infringement by a third party of the Vendor's intellectual property rights.

(c) The Customer will immediately advise the Vendor of any alleged infringement by the Vendor of a third party's intellectual property rights. The Customer will indemnify and hold harmless the Vendor against any losses, costs, actions or liabilities suffered or incurred as a consequence of such infringement or alleged infringement.

(d) The Vendor owns and has copyright in all designs, specifications, documents, and software produced by the Vendor in connection with the Goods provided pursuant to these terms and conditions of trade and the client may use the Goods only if paid for in full and for the purpose for which they were intended and supplied by the Vendor.

31. Suitability of Goods

The Customer must satisfy itself that the Goods as ordered are fit and suitable for the purpose for which they are required. The Vendor makes no warranties or representation and expressly negates any implied or expressed condition that the Goods will be suitable for a particular purpose or use for which the Customer may use them. The Customer accepts all risk and responsibility for consequences arising from the use of the Goods whether singularly or in combination with other Goods.

32. Dimensions and Specifications

(a) Dimensions and specifications contained or referred to in any Order, catalogue, brochure or other publications maintained or issued by the Vendor are estimates only.

(b) Unless otherwise expressly agreed in writing, it is not a condition of these Terms and Conditions of Trade or any Order that the Goods and Services will correspond precisely with such dimensions and specifications and customary tolerances or in the absence of customary tolerances, reasonable tolerances shall be allowed.

33. Personal Guarantee of Company Directors or Trustees

If the Customer is a Company or Trust, the Director(s) or Trustee(s) signing this contract, in consideration for the Vendor agreeing to supply Goods and grant credit to the Customer at their request, also sign this contract in their personal capacity and jointly and severally personally guarantee as principal debtors to the Vendor the payment of any and all moneys now or hereafter owed by the Customer to the Vendor and indemnify the Vendor against non-payment by the Customer. Any personal liability of a signatory hereto shall not exclude the customer in any way whatsoever from the liabilities and obligations contained in these Terms and Conditions of Trade. The signatories and the Customer shall be jointly and severally liable under these Terms and Conditions of Trade and for payment of all sums due hereunder.

34. Assignment

(a) The Customer shall not assign all or any of its rights or obligations under this contract without the written consent of the Vendor.

(b) The Vendor is entitled at any time to assign to any other party all or any part of a debt which is owing to the Vendor.

(c) The Vendor may also assign or sub-contract any part of the work which is to be performed under any contract.

(d) In respect of any assignment by the Vendor pursuant to this clause, the Assignee shall be entitled to the full rights of the Vendor.

35. Disputes

(a) In the event of any dispute arising between the Vendor and the Customer, such dispute shall in the first instance be referred to mediation for resolution.

(b) In the event that resolution by mediation is not achieved to the satisfaction of both parties within 30 days of referral to mediation, either party may then take legal action to resolve the dispute.

(c) Nothing in this clause prevents the Vendor from taking legal action to enforce payment of any debt due, nor where required to seek interlocutory or injunctive relief.

36. Notices

All notices required or committed under these Terms of Trade are to be served as provided in section 152 of the Property Law Act 1952, or by facsimile, in which case notice is deemed to be given the day after sending.

37. Validity

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

38. Changes of General Terms and Conditions

(a) The Vendor may at any time refuse an order by the Customer or decline to approve any application by the Customer for any reason whatsoever.

(b) The existence of an account by the Customer with the Vendor does not automatically entitle the Customer to credit in the future.

(c) Failure by the Vendor to enforce any of the terms and conditions contained in these Terms and Conditions of Trade shall not be deemed to be a waiver of any of the rights or obligations the Vendor has under these Terms and Conditions of Trade.

(d) The Vendor may from time to time by written notice to the Customer amend, add to, delete or replace the trading conditions covered by this Agreement or may substitute any fresh trading conditions and such amendment, addition or substitute trading conditions shall be binding on the Customer fourteen days after the date of delivery of the notice.

39. Force Majeure

Neither the Vendor nor the Customer will be liable to the other for any breach of this Agreement by any extraordinary occurrences which are beyond the reasonable control of the party in question.

40. Entire Agreement

These Terms and Conditions of Trade constitute the entire agreement and supersede and extinguish all prior agreements and understandings between the Vendor and the Customer.

41. Other Agreements

If there is inconsistency between these Terms and Conditions of Trade and any order submitted by the Customer or any other arrangement between the Vendor and Customer, these Terms and Conditions of Trade prevail unless otherwise agreed in writing by the parties.

42. Governing Law

These Terms and Conditions of Trade will be interpreted in accordance with and governed by the laws of New Zealand and the New Zealand Courts will have exclusive jurisdiction over any dispute in relation to the Goods.