



Terms and Conditions of Sale

Where the Guarantees Act 1993 applies to the contract, nothing in these Terms and Conditions limits or affects the Buyers rights and remedies under that Act.

1. INTERPRETATION

1.1 In these Terms and Conditions unless the context otherwise requires, the following words have the following meanings:

“Company” means MM Kembla New Zealand Limited.

“Buyer” Means the person, firm or company buying the Supplies from the Company.

“Supplies” means the goods or services purchased by the Buyer from the Company.

“Terms and Conditions” means the Terms and Conditions contained in this document.

“Contract” means the contract between the company and the buyer for the purchase of the Supplies and includes these Terms and Conditions and the company’s confirmation of order.

“Contract Price” means the price of the Supplies as agreed between the Company and the Buyer subject to variation in accordance with clause 4.2.

“Person” means a corporation, association, partnership or individual.

1.2 Headings and margin notes have been used for convenience only and are deemed not to be part of these Terms and Conditions.

2. APPLICATION OF TERMS AND CONDITIONS

2.1 These Terms and Conditions are the Terms and Conditions on which the Company offers to sell the Supplies to the Buyer and which regulate the rights and obligations of the Company and the Buyer relating to the Supplies.

2.2 These Terms And Conditions shall prevail and take precedence over the buyer’s standard or special terms for the ordering of the Supplies, including any terms that may be printed on the order form or other documents that may be issued by the Buyer when ordering the supplies. This clause shall prevail notwithstanding any statements to the contrary on forms printed by the Buyer.

2.3 In the case of any conflict between these Terms And Conditions and the Company’s confirmation of order or any other document provided by the Company, these Terms And Conditions shall prevail.

3. QUOTATIONS

3.1 Quotations given by the company must be accepted in writing by the Buyer within the period specified on the Quotation.

3.2 The Company may withdraw the Quotation prior to acceptance.

4. PRICE

4.1 The Buyer is responsible for the payment of any duties and taxes (including Goods and Service Tax) assessed or levied in connection with the Supplies.

4.2 The Contract Price may be increased if the Company suffers any increases which are beyond the control of the Company in any of the costs of supply, production or delivery of the Supplies (including increases in taxes and duties) between the date of contract (or quotation) and delivery.

5. PAYMENT

5.1 Unless there is written provision to the contract, the buyer shall pay for Supplies by the 20th of the month following invoicing.

5.2 In the case of export sales, payment shall be made by confirmed irrevocable letter of credit unless otherwise agreed. Letters of credit shall, unless otherwise agreed be established through a first class bank and be irrevocable, confirmed and without recourse, available for the Company’s draft at sight and otherwise in a form satisfactory to the Company.

- 5.3 Invoices shall be paid without deduction or set-off.
- 5.4 Receipt of a cheque, bill of exchange or other negotiable instrument by the Company shall not constitute payment and the Buyer shall remain liable for the full Contract Price until such negotiable instrument is paid in full.
- 5.5 If payment is not made in full by due date, the Company at its option and without prejudice to any other remedies available to it may charge interest on the unpaid overdue balance at a rate of 4% per annum above the current overdraft rate charged by the Company's principal bankers.
- 5.6 If at any time the Company deems the credit of the Buyers to be unsatisfactory, it may require the Buyer to provide, at the Buyers cost, security for payment and/or the Company may suspend performance of any of its obligations under the Contract until security is provided to the Company's satisfaction and may require the Buyer to pay all costs incurred as a result of suspension and recommencement of supply.
- 5.7 Where manufacture and delivery of the Supplies is delayed because of any act, omission, default or request of the Buyer, the Company, without prejudice to any other rights it might have under this Contract, may require the Buyer to pay that portion of the Contract Price which represents the costs already incurred in carrying out the work required under the Contract, in addition to costs pursuant to this clause in respect to delays.

6. DELIVERY

- 6.1 Delivery or completion times stated by the Company are estimates only, and are based on present production commitments, availability of materials, labour, and transport. The Company shall make every effort to ensure that delivery is made at the time advised to the buyer but will not be liable for any loss or damage arising in any way from any delay in delivery.
- 6.2 The Buyer's right to possess the Supplies shall not arise prior to delivery.
- 6.3 The buyer shall give the Company reasonable notice of the dates, times and quantities for delivery, and shall provide all weather access to suitable delivery areas. Provided the Company acts with reasonable care and skill in making the delivery, the buyer shall indemnify the Company against all costs, claims and expenses incurred in making delivery to the buyer's delivery area.
- 6.4 Where no place of delivery is indicated in the contract, delivery shall be deemed to have taken place when and where the Supplies are made available by the Company to the buyer at the Company's premises.
- 6.5 In the case of export sales, delivery on sale FOB, CIF or C&F shall, unless otherwise stated in the Contract, be complete when the Supplies effectively pass the ship's rail at the port of shipment or arrive at the airport for dispatch or earlier leave the Company's custody for shipment to the Buyer. Transshipment shall be allowed.
- 6.6 The Company reserves the right to deliver the Supplies by instalments and the Company shall be entitled to regard each instalment as a separate contract under the same Terms and Conditions as the main Contract. Failure or delay by the Company in making delivery of one or more instalment shall not entitle the Buyer to cancel or repudiate the Contract.
- 6.7 The Buyer shall pay all incidental charges and costs incurred by the Company in making delivery, including (without limitation) waiting time, delivery outside normal business hours, unloading equipment and labour, and costs of securing access to the site.
- 6.8 Where the buyer delays in taking, or fails or refuses to take delivery of any Supplies, the Buyer shall pay any costs incurred by the Company in respect of transportation and storage of the Supplies. If the delay continues for more than 30 days, the Company shall, without prejudice to any other remedies available to it, dispose of the Supplies at the buyers cost (including any loss of value of the Supplies) and terminate the contract.
- 6.9 The buyer must make claims for delivery of incorrect quantities in writing and within 7 days of the delivery of the Supplies.

7. RISK

- 7.1 Risk in the Supplies shall pass to the Buyer upon delivery of the Supplies to the Buyers delivery area.

7.2 Any claims for Supplies damaged in transit or during unloading must be noted on the delivery docket at the time of delivery and notified to the Company within 7 days after the date of delivery.

8. PROPERTY

8.1 Property and ownership of the Supplies will not pass to the Buyer but will remain with the Company until payment in full for the purchase price of the Supplies and all other amounts owing to the Company by the Buyer.

8.2 Until property passes to the Buyer:

- a) the Buyer shall hold the Supplies as fiduciary bailee and agent for the Company; and
- b) the Buyer shall store the Supplies separately and in a manner to enable them to be identified and cross referenced to particular invoices, and shall permit the Company's servants or agents to enter into premises in which any supplies are stored during normal working hours for the purpose of inspection; and
- c) unless otherwise notified in writing the Buyer is authorised to sell the Supplies in the ordinary course of business; and
- d) the proceeds of any Supplies sold shall be kept in a separate account and shall not be mixed with any other moneys, including funds of the Buyer; and
- e) the Buyer irrevocably authorises the Company or its agent to enter the Buyer's premises (without being responsible for any damage caused by entry) to remove any Supplies which are the property of the Company.

8.3 If the Company exercises its rights to reposes any Supplies it shall be entitled to dispose of them for its own benefit, and the Buyer shall indemnify the Company against any costs or damage incurred in reclaiming and disposing of the Supplies, including without limitation loss of value of the Supplies, costs of repossession (including costs of damage to premises), storage or resale and legal costs. These costs shall be recoverable as a debt due by the Buyer to the Company.

9. EVENTS OF DEFAULT

9.1 Notwithstanding the clause above, all payments shall become immediately due to the Company and the Company may at its option suspend or terminate the Contract and/or exercise any of the remedies available to it under the Contract in the event that:

- a) a receiver is appointed over any of the assets or the undertakings of the Buyer;
- b) an application for the appointment of a liquidator is filed against the Buyer which remains unsatisfied for a period of 10 days, or any of the conditions necessary to render the Buyer liable to have a liquidator exist, or a liquidator is appointed;
- c) the Buyer goes into voluntary liquidation, amalgamates with any other company or acquires its own shares in accordance with the Companies Act 1993;
- d) the Buyer suspends payments to its creditors or makes or attempts to make an arrangement or scheme with its creditors;
- e) the buyer becomes insolvent within the meaning of the Insolvency Act 1967, or is, becomes or is presumed to become unable to repay its debts as they fall due as defined in section 287 of the Companies Act 1993 or section 261 of the Companies Act 1956 or commits any act of Bankruptcy;
- f) the Company suspends performance of its obligations under the Contract pursuant to clause 5.4 of these Terms and Conditions.

9.2 Any suspension of the Contract by the Buyer under clauses shall not prevent the Company from terminating the Contract during the period of suspension.

10. WARRANTY

10.1 All orders are accepted on the basis that the Buyer is responsible to determine that the suitability of the Supplies for any particular purpose. Product data, design and performance details included in Company literature or given by Company staff or agents is provided as a guide to available information and the Company does not accept any liability whatsoever for its accuracy nor for any loss, injury or expense or for the results obtained by the Buyer resulting from the misuse of the information.

10.2 Where a specified warranty period is given in respect to Supplies this does not in any way limit or effect any rights to any consumer under the Consumer Guarantees Act 1993.

10.3 Where the Supplies are manufactured by the Company, the Company warrants that it will replace or at its option repair Supplies that it accepts as defective in material and workmanship under normal use, provided that the Buyer notifies the company in writing of any such defect within the specified warranty period.

10.4 This warranty shall not apply where:

- a) the defect or failure is due or resulting from misapplication, misuse, negligent storage, installation or operation or maintenance of the Supplies and/or the systems in which they form a part;
- b) Supplies comply with relevant published standards and tolerances;
- c) the defect or failure is due to acts, defaults or omissions or events outside the control of the Company.

10.5 Where the Supplies or any component(s) of the Supplies are not manufactured by the Company, the Company will pass to the Buyer any benefits of the manufacturers warranty.

11. BUSINESS PURPOSES

11.1 If the Buyer acquires the Supplies from the Company for the purpose of a business in any way, or the Buyer holds itself out as acquiring the Supplies for the purposes of a business in any way, the Buyer agrees to the following terms:

- a) the conditions, warranties and guarantees, representations and descriptions set out in the Sale of Goods Act 1908 and the Consumer Guarantees Act 1993 or implied by law, trade or custom will not apply and are excluded from the Contract; and
- b) the Buyer may not claim any of the remedies set out in the Consumer Guarantees Act 1993 from the Company or from any manufacturer of the Supplies or from any manufacturer of any components or parts in the Supplies; and
- c) the only warranties, representations, conditions and agreements in respect of the Contract and the Supplies are those which are expressly authorised or confirmed in writing by the Company; and
- d) the Company's liability in respect of all claims for loss, damage or injury arising from breach of any of the Company's obligations arising under on in connection with the Contract or from failure to perform the Company's warranty obligations or from negligence on the part of the Company, its servants, agents or contractors shall not in aggregate exceed that portion of the Contract Price invoiced to the Buyer; and
- e) the Company, its servants, agents and contractors and any manufacturer(s) of the Supplies or any of their materials or components will not be liable to the Buyer for any consequential loss or damage however that loss or damage is caused or arises. This exclusion of liability includes but is not limited to consequential loss or damage caused by or arising from delays in manufacturing or delivery, faulty installation, unreasonable use, negligence (including a failure to do something which should have been done or to prevent something from happening), faulty design, and faulty material, equipment or component parts in the Supplies. The exclusion also includes costs incurred in returning the Supplies to the Company or to any manufacturer.

11.2 Where any testing, commissioning or acceptance procedure required by the Contract has been successfully completed, the Buyer shall not make any claim against the Company that the Supplies fail to comply with the Contract other than in respect of any warranties available to the Buyer pursuant to clause 11.1c above.

12. BUYER WARRANTIES

12.1 The Buyer warrants that if the Buyer purchases any Supplies from the Company for resupply as, or incorporates any Supplies into goods ordinarily acquired for personal household or domestic use ("Consumer Products") it will supply the Consumer Products on the following conditions:

- a) If it supplies the Consumer Products for resupply it will ensure that its Terms and Conditions of supply require its customer and each person in the distribution chain to include in its supply agreements or condition of sale obligations requiring its customer to exclude liability for any claims under the Consumer Guarantees Act 1993 but only where the end user/consumer acquires the Consumer Products for business purposes.
- b) If it supplies the Consumer Products directly to an end user/consumer it will do so using terms and condition of supply which exclude liability for any claims under the

Consumer Guarantees Act 1993, but only where the end user/consumer acquires the Consumer Products for business purposes.

12.2 The Buyer warrants that it will indemnify the Company against any failure by the Buyer, its customers or any person in the distribution chain to properly contract out of liability under the Consumer Guarantees Act 1993 to business end users in respect of the Supplies.

13. COPYRIGHT

13.1 Where the Company has followed specifications provided by the Buyer the Buyer shall indemnify the Company against all damages, penalties, costs and expenses in respect of which the Company may become liable through the utilisation of those specifications including those arising from infringement of any patent, trademark, copyright, registered design or any other right of any third party.

14. RETURN OF SURPLUS STOCK

14.1 At its option, the Company may accept return for credit of Supplies which are surplus to the Buyer's requirements provided that:

- a) the Supplies are returned to the Company at the Buyer's cost;
- b) all details of the original invoice accompany the Supplies;
- c) the value of the Supplies returned exceeds a minimum value as notified by the Company;
- d) the Supplies are unused, undamaged, are not obsolete or superseded and in good saleable condition;
- e) the Company has consented in writing to the return prior to their return.

14.2 The Company will charge a handling fee on Supplies returned for credit which are not defective.

15. GENERAL CONDITIONS

15.1 These Terms and Conditions shall not be modified or varied unless expressly in writing and agreed to by both the Company and the Buyer.

15.2 The Buyer may not assign any of its rights or obligations under the Contract without the prior written consent of the Company.

15.3 Where the Company fails to enforce any Terms and Conditions in the contract or fails in any way to exercise its rights under the Contract, the Company will not be deemed to have waived those rights with respect to any subsequent breach of any term or condition or right.

15.4 If any clause or part of a clause of this agreement is held to be invalid or unenforceable for whatever reason, the remaining provisions shall remain in full force and effect.

15.5 The Company shall not be liable for any delay in performing its obligations under this agreement to the Buyer caused in whole or in part by force majeure which shall include (but not be limited to) any act of God, natural disaster, flood or earthquake, strike, lockout, fire, war suit, civil commotion, inability to obtain products or supplies including the imposition of any export or import bans or any other cause beyond the reasonable control of the company.

15.6 Where the Buyer is an individual, the Buyer shall irrevocably authorise the Company:

- a) (Subject to any confidentiality obligations) to obtain from any third party such information respect of the buyer as the Company may require in connection with its lawful commercial purposes.
- b) to provide any such information to any third party in connection with its lawful commercial purposes

15.7 The Terms and Conditions of the Contract are governed by the laws of New Zealand.