

C.M. Trailer Equipment Ltd. – Terms and Conditions of Sale

1. INTERPRETATION

In these Terms:

- 1.1 "**C.M.**" means C.M. Trailer Equipment Limited C.M. and its contractors, successors and assigns.
"**Terms**" means these terms and conditions as amended by C.M. from time to time.
"**Goods**" means the goods ordered from C.M. as more particularly specified by the Customer and, where the context requires, includes some or all of them.
"**Customer**" means a person, company or other entity, jointly and severally if there is more than one, obtaining the Goods or Services.
"**Intellectual Property**" means all copyright, patents, trade marks, names, formulae, specifications, confidential information and all modifications, improvements and enhancements (whether registrable or not) owned by C.M. or its parent company in respect of the Goods or Services.
"**GST**" means any consumption tax imposed by government, whether at point of supply or at some other specified occurrence, by whatever name, and includes (without limitation) a Goods and Services Tax (whether pursuant to the Goods and Services Tax Act 1985 or otherwise), a broad based consumption or indirect tax and value-added tax.
"**PPSA**" means the Personal Property Securities Act 1999.
"**Services**" means any services provided by C.M. at the request of the Customer in respect of the Goods.

- 1.2 Unless the context otherwise requires, terms and expressions in these Terms which are defined in the PPSA shall have the same meaning in these Terms as in the PPSA.
1.3 References to any statutory provision are to statutory provisions in force in New Zealand and include any statutory provision which amends or replaces it, and any by law, regulation, order, statutory instrument, determination or subordinate legislation made under it.
1.4 All monetary amounts are stated exclusive of GST and in New Zealand currency, and all amounts payable by a party under this agreement are to be paid in that currency. GST is payable at the same time and in the same manner as is any other amount payable under this agreement, where that amount is subject to GST under the Goods and Services Tax Act 1985.

2. BASIS OF AGREEMENT

- 2.1 Unless otherwise agreed by C.M. in writing, the Terms apply exclusively to the provision of Goods and Services from C.M. to the Customer and cannot be varied or supplanted by any other terms or conditions, unless expressly agreed by the parties in writing.
2.2 The descriptions, illustrations and performance specifications of the Goods in the quotation, catalogues, price lists and other advertising material do not form part of these Terms.
2.3 Any order form submitted by the Customer to C.M. is considered an offer only and is not binding on C.M. until accepted. On acceptance, these Terms will govern the relationship between C.M. and the Customer.
2.4 C.M. may substitute any compatible or suitable Goods if the specific Goods ordered by the Customer are unavailable for any reason, upon agreement with the Customer.
2.5 Where there are amounts owing by the Customer to C.M., the Customer shall, at the request of C.M., within 5 days provide a written inventory of any dealing with the Goods, including details of those Goods that have:
(a) been sold by the Customer;
(b) become an accession; or
(c) been so manufactured, processed, assembled, or commingled that their identity has been lost.
Where the Customer has previously provided an inventory to C.M., any subsequent inventory need only include details of any dealings with the Goods since the most recent inventory provided. If requested by C.M. a requested written inventory shall also include the amount and location of any proceeds that the Customer is at that time holding on trust for C.M. (in accordance with clause 6.1(d)).

3. PRICE

- 3.1 Any price quoted by C.M. to the Customer for Goods or Services is valid for 14 days and is subject to the Customer accepting these Terms. Where an order is placed after the 14 day period has expired or where no price was quoted, C.M. may charge the Customer the price for any Goods or Services current at the time of delivery. Within the 14 day period referenced above, C.M. may charge an additional 15% on top of the quoted price without notification to the customer. Any such increase in price will supercede the initial quoted price given.
3.2 Prices quoted are exclusive of:
(a) GST;
(b) Delivery costs;
(c) Insurance; and
(d) Any other duties or imposts.

- 3.3 The Customer must pay, in addition to the price, any amount incurred by C.M. as detailed in clause 3.2 in connection with the Goods or Services unless otherwise stated by C.M. in writing.

4. PAYMENT

- 4.1 Subject to clause 4.4 payment must be made in full on delivery.
4.2 If credit items are provided by C.M., payment must be made in full within 30 days of the date of invoice. Payment by cheque shall not be deemed made until clearance of the cheque.
4.3 C.M. may refuse, cancel or change any provision of credit to the Customer at any time.

- 4.4 If the Customer has ordered custom made Goods, or Goods that will be delivered more than 3 months after the order date is placed, C.M. requires monthly progress payments of not less than 20% of the Price. The first progress payment must be made no more than 30 days after the order is placed, and on the corresponding day each month after that.
4.5 Any other payment terms must be agreed in writing and signed by C.M.
4.6 The Customer may not deduct or set off or withhold payment from any monies due to C.M. for any reason, unless expressly agreed by C.M. in writing in advance.
4.7 Any payment received from the Customer may be applied by C.M. to all or part of the amount owing for any Goods and Services, as C.M. sees fit.
4.8 Any payment received from the Customer that is not applied by C.M. under clause 4.7 above shall first go towards satisfying the Customer's obligation to pay for Goods that, at the time of payment, have been sold by the Customer. The balance (if any) shall go towards satisfying the Customer's obligation to pay for Goods that have not been sold by the Customer and any Services supplied by C.M. to the customer. This provision shall apply irrespective of the order in which Goods have been delivered to the Buyer, any entry contained in a statement of account issued by C.M., any rule of law or any other matter.
4.9 Clauses 4.7 and 4.8 shall apply to any payment received from the Customer irrespective of whether that payment is intended by the Customer to be for particular Goods and Services or in respect of a particular invoice.

5. PAYMENT DEFAULT

- 5.1 If the Customer defaults in payment by the due date of any amount payable to C.M. or fails to comply with these Terms C.M., or credit is cancelled by C.M. for any reason, then all money which would become payable by the Customer to C.M. at a later date on any account, becomes immediately due and payable without the requirement of any notice to the Customer, and C.M. may, without prejudice to any other remedy available to it –
(a) charge the Customer compounding interest on any sum due at the prevailing rate per annum equal to the retail lending base rate of The Australia and New Zealand Banking Group Limited ("ANZ") plus 4 per cent as varied from time to time and calculated on a daily basis for the period from the due date until the date of payment in full;
(b) charge the Customer for all expenses and costs (including legal costs and disbursements on an indemnity basis) incurred by it resulting from the default in taking whatever action it deems appropriate to recover any sum due;
(c) cease or suspend for such period as C.M. thinks fit, supply of any further Goods or Services to the Customer;
(d) by notice in writing to the Customer, terminate any agreement with the Customer so far as unperformed by C.M.; and
(e) exercise any and all remedies afforded to a secured party by Part 9 of the PPSA and enter any building or premises owned, occupied or used by the Customer to search for and re-take possession of the Goods, without effect on the accrued rights of C.M. under any agreement.
5.2 Clause 5.1(c), (d) and (e) may also be relied upon, at the option of C.M.:
(a) where the Customer is an individual and becomes bankrupt or enters into a scheme of arrangement or any assignment or composition with or for the benefit of his or her creditors or any class of his or her creditors generally; or
(b) where the Customer is a company or other entity and it enters into any scheme of arrangement or any assignment or composition with or for the benefit of its creditors or any class of its creditors generally, or has a liquidator, provisional liquidator, administrator, receiver or receiver and manager appointed, or any action is taken for, or with the view to, the liquidation (including provisional liquidation), winding up or dissolution without winding up of the Customer.
5.3 The Customer agrees that sections 114(1)(a), 133 and 134 of the PPSA shall not apply on the enforcement by C.M. of any security interest created or provided for by these Terms. The Customer also waives any rights it may have under section 116, 120(2), 121, 125, , 129 and 131 of the PPSA on such enforcement.

6. PASSING OF PROPERTY

- 6.1 Until full payment in cleared funds is received by C.M. for all Goods supplied by it to the Customer, as well as any and all other amounts owing to C.M. by the Customer –
(a) title and property in all Goods remains vested in C.M. and does not pass to the Customer;
(b) the Customer must hold the Goods as fiduciary bailee and agent for C.M.;
(c) so far as is practicable, the Customer must keep the Goods separate from its goods and maintain the labelling and packaging of C.M.;
(d) the Customer is required to hold the proceeds of any sale of the Goods on trust for C.M. in a separate account and if the Customer uses the Goods in some manufacturing or construction process of its own or of some third party, the Customer shall hold such part of the proceeds of such manufacturing or construction process as relates to the Goods on trust for C.M. in such separate account provided that, in each such case, the portion of the proceeds held on

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- trust for C.M. shall not exceed the Customer's indebtedness to C.M.; and
- (e) C.M. may without notice, enter any premises where it suspects the Goods may be and remove them, and for this purpose the Customer irrevocably licences C.M. to enter such premises and also indemnifies C.M. from and against all costs, claims, demands or actions by any party arising from such action. C.M. may resell any of the goods and apply the proceeds of sale in reduction of any amount owing to C.M. by the Customer.
- 6.2 Even though title to any particular Goods remains in C.M., the Customer may sell those goods on the Customer's own account provided that:
- (a) any such sale is conducted at arms' length and is for the full market value of those Goods;
- (b) any such sale is recorded in writing; and
- (c) C.M. has not requested the return of those goods.
- 6.3 C.M. may bring an action for the price of the Goods even where ownership of the Goods may not have passed to the Customer.
- 6.4 In addition to and separate from any other security interest arising under these Terms, the Customer grants C.M. a security interest in all present and after acquired Goods purchased by the Customer from C.M. as further security for each amount owing to C.M. by the Customer on any account whatsoever and performance of the Customer's obligations under the Terms.
- 6.5 The Customer must advise C.M. immediately of any default by the Customer or any action by third parties (including any of the Customer's creditors) affecting C.M.'s interest in the Goods.
- 6.6 The Customer acknowledges receipt of a copy of these Terms and waives any right it may have to receive from C.M. a copy of any financing statement, financing change statement or verification statement that is registered, issued, or received at any time in relation to these Terms.
- 6.7 The Customer shall immediately notify C.M. of any change of its name.
- 7. RISK AND INSURANCE**
- 7.1 The risk in the Goods and the responsibility to insure the Goods for theft, damage or otherwise will pass to the Customer immediately upon delivery of the Goods to the premises nominated by the Customer, or the collection of the Goods by the Customer.
- 7.2 If the goods remain on C.M.'s premises or with a carrier due to the failure by the Customer to take delivery, the Goods shall be at the Customer's risk from the date and time of the attempted delivery.
- 7.3 Until payment is made in full for the goods, the Customer shall insure the Goods for their full replacement value.
- 8. PERFORMANCE OF CONTRACT**
- 8.1 Where the Customer requests delivery, C.M. will deliver the Goods, at the Customer's expense, to the Customer at the address specified in the order form or as otherwise agreed.
- 8.2 Any date for the availability or delivery of Goods or provision of the Services stated by C.M. is intended as an estimate only and is not a contractual commitment. C.M. will use its reasonable endeavours to meet any estimated dates for delivery of the Goods or completion of the Services.
- 8.3 The Customer must ensure that a suitable area for delivery of the Goods is provided.
- 8.4 If Goods are unable to be delivered, then C.M. reserves the right to return the Goods to C.M.'s premises and charge the Customer for the attempted delivery, and re-delivery, and a fee for the storage of the Goods at its discretion.
- 8.5 No claim for shortages or goods not delivered will be considered unless C.M. is given written notice of the claim within seven (7) days from the date of receipt of Goods by the Customer.
- 8.6 Without limitation to any rights of the Customer provided by law, upon the request of the Customer, C.M. may, in its absolute discretion, accept the return of Goods on request by the Customer, provided that:
- (a) C.M. will charge a minimum restocking fee of 10% for Goods returned/exchanged by the Customer.
- (b) C.M. must first grant a written acceptance to the Customer before the return/exchange of any Goods.
- (c) Goods designed or manufactured to the Customer's specifications may not be returned.
- 9. INTELLECTUAL PROPERTY**
- 9.1 The Customer acknowledges that it has no proprietary right or interest in the Intellectual Property.
- 9.2 The Customer must not register or record or attempt to register or record anywhere in the world the Intellectual Property or any part thereof or any patents, inventions, trade marks or designs derived from or similar to the Intellectual Property or aid or abet anyone else in doing so.
- 9.3 The Customer must not at any time create, sell, manufacture or process any products using or taking advantage of the Intellectual Property.
- 9.4 Any Intellectual Property provided to the Customer by C.M. in connection with the Goods remains the exclusive property of C.M. and must be returned to C.M. on demand and shall not be copied or communicated to any third party without the express prior written consent of C.M.
- 10. LIABILITY**
- 10.1 C.M. is not a designer of the Goods or a consultant in respect of the use of Goods.
- 10.2 Where the Customer provides designs for Goods that it requires C.M. to manufacture, the Customer;
- (a) indemnifies C.M. from all liability regarding the breakdown, non-performance, malfunction, inoperability or defect in design, save for where the defect or fault arises from the negligence of C.M.
- (b) indemnifies C.M. against all damages, penalties and costs to which C.M. may be liable in respect of any infringement of any third party's rights in copyright, design, patent, trademark, or other intellectual property right arising out of the manufacture of Goods.
- 10.3 Where the Customer is acquiring, or holds itself as acquiring, any Goods or Services for the purposes of a business in terms of section 43(2) of the *Consumer Guarantees Act 1993*, the Customer will not assert or attempt to assert any rights or claims against C.M. under the provisions of that Act.
- 10.4 If the Customer is acquiring the Goods or Services for business purposes, the Customer agrees that it is fair and reasonable for the Customer and C.M. not to be bound by sections 9, 12A, 14 and 14(1) of the *Fair Trading Act 1986* in accordance with section 5D of that Act.
- 10.5 Where the Customer supplies the Goods in trade to a person acquiring them for business purposes, it must be a term of the Customer's contract with that person that the Consumer Guarantees Act 1993 does not apply in respect of the Goods.
- 10.6 The Customer acknowledges that C.M. does not provide any Express Guarantees (as defined in the Consumer Guarantees Act 1993) other than those expressly provided by C.M. in writing.
- 10.7 Where the Customer supplies the Goods to any other person in the course of trading, the Customer must not give or make any undertaking, assertion or representation in relation to the goods without C.M.'s prior approval in writing. The Customer agrees to indemnify C.M. against any liability or cost incurred by C.M. under the Consumer Guarantees Act 1993 as a result of any breach by the Customer of the obligations contained in this contract.
- 10.8 The following terms apply whenever the Consumer Guarantees Act 1993 does not apply to this contract, or where the following terms are not inconsistent with the Consumer Guarantees Act 1993:
- (a) defective Goods and Services or Goods and Services which do not comply with their descriptions shall at C.M.'s discretion be repaired or replaced, or the price refunded;
- (b) any right which the Customer may have to reject non-conforming or defective Goods shall only be effective if the Customer notifies C.M. in writing within thirty days following delivery and C.M. is given the opportunity to inspect the Goods;
- (c) C.M. may, at its discretion, delay the repair or replacement of, or the refund of the price of, any Goods for so long as the Customer is in default in relation to any amount owing to C.M. by the Customer;
- (d) Except to the extent expressly provided under these Terms, C.M. accepts no liability for any claim by the Customer or any other person, including, without limitation, any claim relating to or arising from:
- (i) any conditions, warranties, descriptions, representations, conditions as to fitness or suitability for any purpose, tolerance to any conditions, merchantability or otherwise, whether express or implied by law, trade custom or otherwise; or
- (ii) any representations, warranties, conditions or agreement made by any agent or representative, which are not expressly confirmed by C.M. in writing, and the Customer agrees to indemnify C.M. against any such claim.
- (e) In any event, C.M.'s liability under any claim shall not exceed the price of the relevant Goods actually received by C.M.
- 10.9 C.M. will not be liable for any loss or damage suffered by the Customer where C.M. has failed to meet any delivery date or cancels or suspends the supply of Goods or Services.
- 10.10 C.M. shall not be liable to the Customer in respect of any reasonable variation between any sample and the Goods actually supplied to the Customer.
- 10.11 Where the Goods are noted in any written quotation or delivery docket as "rejects", "not first class", "seconds", "NFC" or other similar wording, the Customer agrees that any defects in the Goods have been brought to its attention prior to accepting these Terms.
- 10.12 Nothing in these Terms is intended to have the effect of contracting out of the provisions of the Consumer Guarantees Act 1993 except to the extent permitted by that Act, and these Terms are to be modified to the extent necessary to give effect to that intention.
- 10.13 To the greatest extent possible any express or implied guarantees by statute, common law or otherwise are hereby expressly excluded and to the extent that they are not able to be excluded then C.M.'s maximum liability is, at its option, the purchase price of the Goods actually received by C.M. or replacement of the Goods in respect of which the claim is made.
- 11. WARRANTIES**
- 11.1 The Customer acknowledges and agrees that:
- (a) no statement, warranty, promise, assurance or representation has been made to it in respect of the Goods or Services except as specifically contained in the order form or quote;
- (b) in the choice of Goods or Services it has relied on its own knowledge skill and judgement and not that of C.M.;
- (c) other than is expressly stated in the order form or quotation, the Customer has not advised C.M. either expressly or otherwise that the Goods are required for any particular purpose;

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- (d) C.M. has not given the Customer any information concerning the performance, quality or composition of the Goods except as expressly stated on the order form or quotation.
- 11.2 Except as expressly provided in these Terms, all warranties, conditions and guarantees implied by law as to merchantability, description, quality, suitability or fitness of the Goods or Services for any purpose or as to design, assembly, installation, materials, workmanship or otherwise are expressly excluded.
- 11.3 Any performance or output figures supplied in respect of Goods or Services are estimates only.
- 11.4 Where C.M. provides any warranty in respect of the Goods, such warranty shall not cover claims where:
- (a) the Customer fails to give written notice of the claim to C.M. within seven (7) days of the claim arising, or having done so, fails to return the Goods to C.M. within a further fourteen (14) days together with a detailed written defect statement;
- (b) the Goods have been subjected to abnormal conditions, weather or temperature, humidity, pressure, stress or similar;
- (c) the Goods have not been used in accordance with C.M.'s express instructions, recommendations or specifications or have been misused, abused, neglected, improperly installed, stored or maintained or have been involved in an accident;
- (d) the Goods have been affected by corrosion, erosion or normal wear and tear;
- (e) parts and accessories used in connection with the Goods have not been manufactured or approved by C.M.;
- (f) unauthorised repairs or alterations have been made to the Goods;
- (g) the Goods are damaged due to any power surge or other fault in the supply of electricity.
- 11.5 If, on an inspection of the Goods, C.M. determines that the Goods are not covered by C.M. Warranty then C.M.'s usual charges for service work will apply.
- 11.6 Goods covered by any warranty must be returned to C.M. (and subsequently re-delivered) at the Customer's risk and cost.
- 12. CANCELLATION**
- 12.1 If, through circumstances beyond its control C.M. is unable to effect delivery or provision of Goods or provide the Services, then C.M. may cancel the Customer's order (even if it has already been accepted) by notice in writing to the Customer.
- 12.2 No purported cancellation or suspension of an order or any part thereof by the Customer is binding on C.M., after that order has been accepted by C.M., and the customer agrees to indemnify C.M. for any loss or damage arising from the cancellation.
- 13. PRIVACY**
- 13.1 The Customer must notify C.M. of any change in circumstances (including any change of name) that may affect the accuracy of the information provided by the Customer to C.M. If the Customer is an individual, i.e. a natural person, the Customer has rights under the Privacy Act 1993 to access any personal information which C.M. holds about the Customer in a way that can be readily retrieved and to request correction of the information which C.M. holds about the Customer.
- 13.2 C.M. will ensure that information about the Customer is protected by such security safeguards as it is reasonable in the circumstances to take against loss, unauthorised access, use, modification or disclosure and any other misuse.
- 13.3 C.M. will not disclose the information to any person, except for the purposes described in these Terms or as authorised by the Customer or when required or authorised by law by the Privacy Act 1993.
- 13.4 C.M. requires that the Customer comply with the Privacy Act 1993 in connection with any personal information supplied to it by C.M. in connection with any agreement between the Customer and C.M.
- 14. MISCELLANEOUS**
- 14.1 The laws of New Zealand from time to time govern these Terms. The parties agree to the exclusive jurisdiction of the courts and tribunals of New Zealand, and of courts entitled to hear appeals from those courts and tribunals.
- 14.2 Failure by C.M. to enforce any of these Terms shall not be construed as a waiver of its rights.
- 14.3 If any term or condition is unenforceable it must be read down so as to be enforceable, or if it cannot be read down, the term or condition may be severed from these Terms without affecting the enforceability of the remaining Terms.
- 14.4 Headings are included for convenience only and do not form part of these Terms.