

1. Definitions

- 1.1 “Company” shall mean Denrith Pty Ltd and associated entities (including, but not limited to, Divall's Earthmoving & Bulk Haulage and/or Goulburn Sand & Soil), its successors and assigns or any person acting on behalf of and with the authority of Denrith Pty Ltd.
- 1.2 “Client” shall mean the Client (or any person acting on behalf of and with the authority of the Client) as described on any quotation, work authorisation or other form as provided by the Company to the Client.
- 1.3 “Guarantor” means that person (or persons), or entity, who agrees to be liable for the debts of the Client on a principal debtor basis.
- 1.4 “Goods” shall mean all Goods supplied by the Company to the Client (and where the context so permits shall include any supply of Services as hereinafter defined, Equipment as defined in the “Hire Terms Appendix” and Cargo as defined in the “Freight Terms Appendix”) and are as described on the invoices, quotation, work authorisation or any other forms as provided by the Company to the Client.
- 1.5 “Services” shall mean all Services supplied by the Company to the Client and includes any advice or recommendations (and where the context so permits shall include any supply of Goods as defined above, Equipment as defined in the “Hire Terms Appendix” and Cargo as defined in the “Freight Terms Appendix”).
- 1.6 “Price” shall mean the Price payable for the Goods as agreed between the Company and the Client in accordance with clause 4 of this contract.

2. The Commonwealth Trade Practices Act 1974 (“TPA”) and Fair Trading Acts (“FTA”)

- 2.1 Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the TPA or the FTA in each of the States and Territories of Australia, except to the extent permitted by those Acts where applicable.

3. Acceptance

- 3.1 Any instructions received by the Company from the Client for the supply of Goods and/or Services, and/or the Client's acceptance of Goods and/or Services supplied by the Company shall constitute acceptance of the terms and conditions contained herein.
- 3.2 Where more than one Client has entered into this agreement, the Clients shall be jointly and severally liable for all payments of the Price.
- 3.3 These terms and conditions may be required to be read in conjunction with the Company's “Earthmoving Terms Appendix”, “Hire Terms Appendix” or “Freight Terms Appendix”. If there are any inconsistencies between these documents then the terms and conditions contained in that document shall prevail.
- 3.4 Upon acceptance of these terms and conditions by the Client the terms and conditions are binding and can only be amended with the written consent of the Company.
- 3.5 The Client shall give the Company not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client or any change in the Client's name and/or any other change in the Client's details (including but not limited to, changes in the Client's address, facsimile number, or business practice). The Client shall be liable for any loss incurred by the Company as a result of the Client's failure to comply with this clause.
- 3.6 Goods and/or Services are supplied by the Company only on the terms and conditions of trade herein to the exclusion of anything to the contrary in the terms of the Client's order notwithstanding that any such order is placed on terms that purport to override these terms and conditions of trade.

4. Price and Payment

- 4.1 At the Company's sole discretion the Price shall be either:
 - (a) as indicated on invoices provided by the Company to the Client in respect of Goods and/or Services supplied; or
 - (b) the Company's current price at the date of delivery of the Goods and/or Services according to the Company's current Price list; or
 - (c) the Company's quoted Price (subject to clause 4.2) which shall be binding upon the Company provided that the Client shall accept the Company's quotation in writing within thirty (30) days.
- 4.2 The Company reserves the right to change the Price in the event of a variation to the Company's quotation.
- 4.3 At the Company's sole discretion:
 - (a) a non-refundable deposit may be required; and/or
 - (b) payment shall be due on delivery of the Goods; or
 - (c) payment shall be due on completion of the Services; or
 - (d) payment for approved Clients shall be due thirty (30) days following the end of the month in which a statement is posted to the Client's address or address for notices.
- 4.4 Time for payment shall be of the essence and will be stated on the invoice or any other forms. If no time is stated then payment shall be due fourteen (14) days following the date of the invoice.
- 4.5 Payment will be made by cash, or by cheque, or by bank cheque, or by credit card (plus a surcharge of up to one percent (1.0%) of the Price), or by direct credit, or by any other method as agreed to between the Client and the Company.
- 4.6 GST and other taxes and duties that may be applicable shall be added to the Price except when they are expressly included in the Price.

5. Delivery

- 5.1 At the Company's sole discretion delivery of the Goods shall take place when:
 - (a) the Client takes possession of the Goods at the Company's address; or
 - (b) the Client takes possession of the Goods at the Client's nominated address (in the event that the Goods are delivered by the Company or the Company's nominated carrier).
- 5.2 At the Company's sole discretion the costs of delivery may be in addition to the Price.
- 5.3 The Client shall take delivery of the Goods tendered notwithstanding that the quantity so delivered shall be either greater or lesser than the quantity purchased provided that:
 - (a) such discrepancy in quantity shall not exceed five percent (5%); and
 - (b) the Price shall be adjusted pro rata to the discrepancy.
- 5.4 Subject to clause 5.5 it is the Company's responsibility to ensure that the Services start as soon as it is reasonably possible.
- 5.5 The commencement date will be put back and the duration of the Services extended by whatever time is reasonable in the event that the Company claims an extension of time (by giving the Client written notice) where completion is delayed by an event beyond the Company's control including but not limited to any failure by the Client to:
 - (a) have the site ready for the Services; or

- (b) notify the Company that the site is ready.
- 5.6 Delivery to a third party nominated by the Client is deemed to be delivery to the Client for the purposes of this agreement.
- 5.7 The Company may deliver by separate instalments. Each separate instalment shall be invoiced and paid in accordance with the provisions in these terms and conditions.
- 5.8 The failure of the Company to deliver shall not entitle either party to treat this contract as repudiated.
- 5.9 The Company shall not be liable for any loss or damage whatsoever due to failure by the Company to deliver the Goods and/or Services (or any of them) promptly or at all, where due to circumstances beyond the control of the Company.

6. Risk

- 6.1 If the Company retains ownership of the Goods nonetheless, all risk for the Goods passes to the Client on delivery.
- 6.2 Where the Client expressly requests the Company to leave Goods outside the Company's premises for collection or to deliver the Goods to an unattended location then such Goods shall be left at the Client's sole risk and it shall be the Client's responsibility to ensure the Goods are insured adequately or at all.
- 6.3 If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Client, the Company is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by the Company is sufficient evidence of the Company's rights to receive the insurance proceeds without the need for any person dealing with the Company to make further enquiries.

7. Damages

- 7.1 The Client shall ensure that the Company has clear and free access to the nominated site at all times to enable them to deliver the Goods and/or undertake the Services. The Company shall not be liable for any loss or damage to the site (including, without limitation, damage to pathways, driveways and concreted or paved or grassed areas) unless due to the negligence of the Company.

8. Title

- 8.1 The Company and the Client agree that ownership of the Goods shall not pass until:
- (a) the Client has paid the Company all amounts owing for the particular Goods; and
 - (b) the Client has met all other obligations due by the Client to the Company in respect of all contracts between the Company and the Client.
- 8.2 Receipt by the Company 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 Company's ownership or rights in respect of the Goods shall continue.
- 8.3 It is further agreed that:
- (a) where practicable the Goods shall be kept separate and identifiable until the Company shall have received payment and all other obligations of the Client are met; and
 - (b) until such time as ownership of the Goods shall pass from the Company to the Client the Company may give notice in writing to the Client to return the Goods or any of them to the Company. Upon such notice the rights of the Client to obtain ownership or any other interest in the Goods shall cease; and
 - (c) the Company shall have the right of stopping the Goods in transit whether or not delivery has been made; and
 - (d) if the Client fails to return the Goods to the Company then the Company or the Company's agent may (as the invitee of the Client) enter upon and into land and premises owned, occupied or used by the Client, or any premises where the Goods are situated and take possession of the Goods; and
 - (e) the Client is only a bailee of the Goods and until such time as the Company has received payment in full for the Goods then the Client shall hold any proceeds from the sale or disposal of the Goods, up to and including the amount the Client owes to the Company for the Goods, on trust for the Company; and
 - (f) the Client shall not deal with the money of the Company in any way which may be adverse to the Company; and
 - (g) the Client shall not charge the Goods in any way nor grant nor otherwise give any interest in the Goods while they remain the property of the Company; and
 - (h) the Company can issue proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods may not have passed to the Client; and
 - (i) until such time that ownership in the Goods passes to the Client, if the Goods are converted into other products, the parties agree that the Company will be the owner of the end products.

9. Defects, Errors or Omissions

- 9.1 The Client shall inspect the Goods on delivery and/or Services on completion; and shall within seven (7) days notify the Company of any alleged defect, error or omission, shortage in quantity, damage or failure to comply with the description or quote. The Client shall afford the Company an opportunity to inspect the same within a reasonable time following such notification if the Client believes a defect exists. If the Client shall fail to comply with these provisions the Goods and/or Services shall be presumed to be free from any defect or damage. For defective Goods and/or Services, which the Company has agreed in writing that the Client is entitled to reject, the Company's liability is limited to either (at the Company's discretion) replacing the Goods and/or Services, rectifying the Services, or repairing the Goods; except where the Client has acquired such as a consumer within the meaning of the Trade Practices Act 1974 (Cwlth) or the Fair Trading Acts of the relevant state or territories of Australia, and is therefore also entitled to, at the consumer's discretion either a refund of the Price, repair of the Goods, rectification of the Services, or replacement of the Goods and/or Services.
- 9.2 Goods will not be accepted for return other than in accordance with 9.1 above.

10. Warranty

- 10.1 For Goods not manufactured by the Company, the warranty shall be the current warranty provided by the manufacturer of the Goods. The Company shall not be bound by nor be responsible for any term, condition, representation or warranty other than that which is given by the manufacturer of the Goods.

11. Intellectual Property

- 11.1 Where the Company has designed, drawn or written Goods and/or Services for the Client, then the copyright in those designs and drawings and documents shall remain vested in the Company, and shall only be used by the Client at the Company's discretion.

- 11.2 The Client warrants that all designs or instructions to the Company will not cause the Company to infringe any patent, registered design or trademark in the execution of the Client's order and the Client agrees to indemnify the Company against any action taken by a third party against the Company in respect of any such infringement.
- 11.3 The Client hereby authorises the Company to utilise images of the Goods and/or Services designed or supplied by the Company in advertising, marketing, or competition material by the Company.

12. Default and Consequences of Default

- 12.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and a half percent (2.5%) per calendar month (and at the Company's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 12.2 In the event that the Client's payment is dishonoured for any reason the Client shall be liable for any dishonour fees incurred by the Company.
- 12.3 If the Client defaults in payment of any invoice when due, the Client shall indemnify the Company from and against all costs and disbursements incurred by the Company in pursuing the debt including legal costs on a solicitor and own client basis and the Company's collection agency costs.
- 12.4 Without prejudice to any other remedies the Company may have, if at any time the Client is in breach of any obligation (including those relating to payment) the Company may suspend or terminate the supply of Goods and/or Services to the Client and any of its other obligations under the terms and conditions. The Company will not be liable to the Client for any loss or damage the Client suffers because the Company has exercised its rights under this clause.
- 12.5 If any account remains overdue after fourteen (14) days then an amount of the greater of twenty dollars (\$20.00) or ten percent (10%) of the amount overdue (up to a maximum of two hundred dollars (\$200.00)) shall be levied for administration fees which sum shall become immediately due and payable.
- 12.6 Without prejudice to the Company's other remedies at law the Company shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to the Company shall, whether or not due for payment, become immediately payable in the event that:
- (a) any money payable to the Company becomes overdue, or in the Company's opinion the Client will be unable to meet its payments as they fall due; or
 - (b) the Client 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 Client or any asset of the Client.

13. Security and Charge

- 13.1 Despite anything to the contrary contained herein or any other rights which the Company may have howsoever:
- (a) where the Client and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Client and/or the Guarantor agree to mortgage and/or charge all of their joint and/or several interest in the said land, realty or any other asset to the Company or the Company's nominee to secure all amounts and other monetary obligations payable under these terms and conditions. The Client and/or the Guarantor acknowledge and agree that the Company (or the Company's nominee) shall be entitled to lodge where appropriate a caveat, which caveat shall be withdrawn once all payments and other monetary obligations payable hereunder have been met.
 - (b) should the Company elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Client and/or Guarantor shall indemnify the Company from and against all the Company's costs and disbursements including legal costs on a solicitor and own client basis.
 - (c) the Client and/or the Guarantor (if any) agree to irrevocably nominate constitute and appoint the Company or the Company's nominee as the Client's and/or Guarantor's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause 13.1.

14. Cancellation

- 14.1 The Company may cancel any contract to which these terms and conditions apply or cancel delivery of Goods and/or the performance of Services; at any time before the delivery and/or completion by giving written notice to the Client. On giving such notice the Company shall repay to the Client any sums paid in respect of the Price, less any amounts owing for Goods and/or Services already supplied and/or performed. The Company shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 14.2 In the event that the Client cancels delivery of Goods and/or the performance of Services; then the Client shall be liable for any loss incurred by the Company (including, but not limited to, any amounts owing for Goods already supplied and/or Services already performed, and any loss of profits) up to the time of cancellation.
- 14.3 Cancellation of orders for Goods supplied to the Client's specifications or non-stocklist items will definitely not be accepted, once the order has been processed.

15. Privacy Act 1988

- 15.1 The Client and/or the Guarantor/s agree for the Company to obtain from a credit reporting agency a credit report containing personal credit information about the Client and Guarantor/s in relation to credit provided by the Company.
- 15.2 The Client and/or the Guarantor/s agree that the Company may exchange information about the Client and the Guarantor/s with those credit providers either named as trade referees by the Client or named in a consumer credit report issued by a credit reporting agency for the following purposes:
- (a) to assess an application by Client; and/or
 - (b) to notify other credit providers of a default by the Client; and/or
 - (c) to exchange information with other credit providers as to the status of this credit account, where the Client is in default with other credit providers; and/or
 - (d) to assess the credit worthiness of Client and/or Guarantor/s.
- 15.3 The Client consents to the Company being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988).

- 15.4 The Client agrees that personal credit information provided may be used and retained by the Company for the following purposes and for other purposes as shall be agreed between the Client and Company or required by law from time to time:
- (a) provision of Goods and/or Services; and/or
 - (b) marketing of Goods and/or Services by the Company, its agents or distributors in relation to the Goods and/or Services; and/or
 - (c) analysing, verifying and/or checking the Client's credit, payment and/or status in relation to provision of Goods and/or Services; and/or
 - (d) processing of any payment instructions, direct debit facilities and/or credit facilities requested by Client; and/or
 - (e) enabling the daily operation of Client's account and/or the collection of amounts outstanding in the Client's account in relation to the Goods and/or Services.
- 15.5 The Company may give information about the Client to a credit reporting agency for the following purposes:
- (a) to obtain a consumer credit report about the Client; and/or
 - (b) allow the credit reporting agency to create or maintain a credit information file containing information about the Client.
- 16. Building and Construction Industry Security of Payments Act 1999**
- 16.1 At the Company's sole discretion, if there are any disputes or claims for unpaid Goods and/or Services then the provisions of the Building and Construction Industry Security of Payments Act 1999 may apply.
- 16.2 Nothing in this agreement is intended to have the affect of contracting out of any applicable provisions of the Building and Construction Industry Security of Payments Act 1999 of New South Wales, except to the extent permitted by the Act where applicable.
- 17. General**
- 17.1 If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 17.2 These terms and conditions and any contract to which they apply shall be governed by the laws of New South Wales and are subject to the jurisdiction of the courts of Goulburn.
- 17.3 The Company shall be under no liability whatsoever to the Client for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by the Company of these terms and conditions.
- 17.4 In the event of any breach of this contract by the Company the remedies of the Client shall be limited to damages which under no circumstances shall exceed the Price of the Goods and/or Services.
- 17.5 The Client shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Client by the Company nor to withhold payment of any invoice because part of that invoice is in dispute.
- 17.6 The Company may license or sub-contract all or any part of its rights and obligations without the Client's consent.
- 17.7 The Client agrees that the Company may review these terms and conditions at any time. If, following any such review, there is to be any change to these terms and conditions, then that change will take effect from the date on which the Company notifies the Client of such change.
- 17.8 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.
- 17.9 The failure by the Company to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect the Company's right to subsequently enforce that provision.

EARTHMOVING TERMS APPENDIX

18. Payment

- 18.1 The Company may submit a detailed payment claims at intervals not less than monthly for Services performed up to the end of each month. The value of Services so performed shall include the reasonable value of authorised variations and the value of Goods delivered to the site but not installed.
- 18.2 Any variation from the plan of scheduled Services or specifications (including, but not limited to, any variation as a result of additional Services required due to hidden or unidentifiable difficulties beyond the reasonable control of the Company such as hard rock barriers below the surface or iron reinforcing rods in concrete) will be detailed in writing and charged for on the basis of the Company's quotation and will be shown as variations on the invoice. Payment for all variations must be made in full at their time of completion.

19. Retentions

- 19.1 At the Company's sole discretion payment of the Price shall be subject to retention by the Client of an amount (hereafter called the "retention money"), being equal to a percentage of the Price as agreed between the parties. The Client shall hold the retention money for the agreed period following completion of the Services during which time all Services are to be completed and/or all defects are to be remedied.

20. Underground Locations

- 20.1 Prior to the Company commencing the Services, the Client must advise the Company of the precise location of all underground services on the site and clearly mark the same. The underground mains and services the Client must identify include, but are not limited to, electrical services, gas services, sewer services, pumping services, sewer connections, sewer sludge mains, water mains, irrigation pipes, telephone cables, fibre optic cables, oil pumping mains, and any other services that may be on site.
- 20.2 Whilst the Company will take all care to avoid damage to any underground services the Client agrees to indemnify the Company in respect of all and any liability claims, loss, damage, costs and fines as a result of damage to services not precisely located and notified as per clause 20.1.

21. Compliance with Laws

- 21.1 The Client and the Company shall comply with the provisions of all statutes, regulations and bylaws of government, local and other public authorities that may be applicable to the Services.
- 21.2 The Client shall obtain (at the expense of the Client) all licenses and approvals that may be required for the Services.
- 21.3 The Client agrees that the site will comply with any occupational health and safety laws relating to building/construction sites and any other relevant safety standards or legislation.

22. Insurance

- 22.1 The Company shall have public liability insurance of at least \$5m. It is the Clients responsibility to ensure that they are similarly insured.

23. Dispute Resolution

- 23.1 If a dispute arises between the parties to this contract then either party shall send to the other party a notice of dispute in writing adequately identifying and providing details of the dispute. Within fourteen (14) days after service of a notice of dispute, the parties shall confer at least once, to attempt to resolve the dispute. At any such conference each party shall be represented by a person having authority to agree to a resolution of the dispute. In the event that the dispute cannot be so resolved either party may by further notice in writing delivered by hand or sent by certified mail to the other party refer such dispute to arbitration. Any arbitration shall be:
- (a) referred to a single arbitrator to be nominated by the President of the Institute of Arbitrators Australia; and
 - (b) conducted in accordance with the Institute of Arbitrators Australia Rules for the Conduct of Commercial Arbitration.

FREIGHT TERMS APPENDIX

18. Additional Definitions

- 18.1 "Consignee" shall mean the person to whom the Cargo is to be delivered by way of the Company's Services.
- 18.2 "Cargo" shall mean goods together with any container, packaging, or pallet(s) to be moved from one place to another by way of the Services, or for storage by the Company; as described on the consignment note, sales order or any other forms as provided by the Company to the Client.

19. Client's Responsibilities

- 19.1 The Client expressly warrants to the Company that:
- (a) the Client is either the owner or the authorised agent of the owner of any Cargo or property that is the subject matter of this contract of cartage and/or storage and by entering into this contract the Client accepts these conditions of contract for the Consignee as well as for all other persons on whose behalf the Client is acting; and
 - (b) the Client has complied with all applicable laws and regulations relating to the nature, condition, packaging or carriage of the Cargo, and that the Cargo is packed in a manner, having regard to its nature, adequate to withstand the ordinary risks of carriage; and
 - (c) the Cargo is accurately described in writing, in the space provided on the consignment note, and in circumstances where the consignment note is written by the driver, that the Client has provided the driver with an accurate description of the Cargo and has checked the accuracy of the description of the Cargo upon receipt of the consignment note; and
 - (d) the Client shall pay to the Company in cash, or as agreed, all sums immediately when due without deduction or deferment on account of any claim, counterclaim or set off; and
 - (e) when the Company is instructed to collect freight, duties, charges or other expenses from any person other than the Client, the Client shall remain responsible for the payment of the amounts and shall make payment to the Company on demand where these amounts have become due and have not been paid by such other person; and
 - (f) the Client indemnifies the Company against any expenses, charges or losses sustained or incurred by the Company in complying with the requirements of any law or otherwise incurred as a result of a breach by the Client of any warranties in clause **Error! Reference source not found.**

20. Company Not Common Carrier

- 20.1 The Company 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 Company subject only to these conditions and the Company 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.

21. Dangerous Cargo

- 21.1 The Client (or the Client's authorised agent) shall not tender for carriage, or for storage, any explosive, inflammable or otherwise dangerous or damaging Cargo without presenting a full description of the Cargo. In default of providing thus, the Client shall be liable, and hereby indemnifies the Company, for all loss or damage whatsoever caused by any Dangerous Cargo.

22. Company's Servants or Agents

- 22.1 The Client undertakes that no claim or allegation shall be made against any servant, sub-contractor or agent of the Company which attempts to impose upon any of them any liability whatsoever in connection with the Cargo and, if any such claim or allegation should nevertheless be made, to indemnify the Company and any such servant or agent against all consequences thereof.

23. Method of Transport

- 23.1 If the Client instructs the Company to use a particular method of carriage the Company will give priority to the method designated but if that method cannot conveniently be adopted by the Company the Client shall be deemed to authorise the Company to carry or have the Cargo carried by another method or methods.

24. Route Deviation

- 24.1 The Client shall be deemed to authorise any deviation from the usual route or manner of carriage of Cargo that may in the absolute discretion of the Company be deemed reasonable or necessary in the circumstances.

25. Consignment Note

- 25.1 The Company shall not be bound to deliver the Cargo, except to the Consignee shown on the consignment note, or to such other persons that may be authorised in writing by the Client to receive the Cargo, and it is expressly agreed that the Company shall be taken to have delivered the Cargo in accordance with this contract if at the nominated delivery address the Company obtains from authorised person a receipt or a signed delivery docket for the Cargo.

26. Delivery

- 26.1 In the event the Company is unable to deliver the Cargo due to circumstances beyond the control of the Company (including, but not limited to, failure on the part of the Consignee to take delivery of the Cargo whenever they are tendered for delivery) the Company shall be entitled to handle and store the Cargo in such manner as it may, in its discretion, determine and shall be entitled to charge a reasonable fee for such handling and/or storage and subsequent redelivery of the Cargo.

27. Limitation of Liability

- 27.1 The Client acknowledges that the Cargo is carried and stored at the Client's sole risk and not at the risk of the Company, and the Company shall not be liable in tort (including negligence), contract (including fundamental breach of contract), bailment, contravention of any statute, or breach of statutory duty, or otherwise; for any loss of or damage to, or failure to deliver, delay in delivery, or mis-delivery of Cargo whatsoever and howsoever caused.

- 27.2 The exclusion of liability in clause **Error! Reference source not found.** extends to include not only loss or damage to the Cargo itself, but loss, damage or injury to any person, property or thing arising from the Company providing the Services under this contract and to any indirect consequential loss arising from such loss, damage or injury, or from failure to deliver, delay in delivery, or mis-delivery.

- 27.3 Notwithstanding any other provision in the condition of carriage, but subject always to clause 27.1 and 27.2, if any liability whatsoever, howsoever arising, is found to attach to the Company (or any servant, sub-contractor or agent of the Company), the Company's liability shall be limited to clause 9.1 (for Services supplied) or in the case of Cargo:

- (a) the replacement of the Cargo or the supply of equivalent goods; or
- (b) the repair of the Cargo; or
- (c) the payment of the cost of either 27.3(a) or 27.3(b); or
- (d) compensation to the maximum amount of five hundred dollars (\$500.00).

28. Unpaid Company's Rights to Dispose of Cargo

- 28.1 The Company shall have a lien on any Cargo (and any documents relating to the Cargo) in the possession or control of the Company for all sums payable by the Client to the Company, and the Company shall have the right to sell such Cargo or goods by public auction or private treaty after giving notice to the Client. The Company shall be entitled to retain the sums due to it, in addition to the charges incurred in detention and sale of such Cargo or goods, from the proceeds of sale and shall render any surplus to the entitled person.

HIRE TERMS APPENDIX

18. Additional Definitions

- 18.1 "Equipment" shall mean Equipment supplied on hire by the Company to the Client (and where the context so permits shall include any supply of Goods and/or Services).
- 18.2 "Minimum Hire Period" shall mean the Minimum Hire Period as described on the invoices, quotation, authority to hire, or any other forms as provided by the Company to the Client.

19. Hire Period

- 19.1 Hire Charges shall commence from the time the Equipment is either collected by the Client from the Company's premises, or delivered by the Company to the nominated site; and will continue until the return of the Equipment to the Company's premises, and/or until the expiry of the Minimum Hire Period, whichever last occurs.
- 19.2 No allowance whatever can be made for time during which the Equipment is not in use for any reason, unless the Company confirms special prior arrangements in writing. In the event of Equipment breakdown provided the Client notifies the Company immediately, hiring charges will not be payable during the time the Equipment is not working, unless the condition is due to negligence or misuse on the part of or attributable to the Hirer.
- 19.3 The Hirer shall be responsible for free access by the Company to the site on which the Equipment is located. If there are any delays due to free access not being available then the Client shall be responsible and shall reimburse the Company for all lost hire fees associated with the Equipment being unavailable. The Client shall also be responsible for all other expenses and costs incurred by the Company due to delays in access to the Equipment.

20. Title

- 20.1 The Equipment is and will at all times remain the absolute property of the Company.
- 20.2 If the Client fails to return the Equipment to the Company then the Company, or the Company's agent, may (as the invitee of the Client) enter upon and into land and premises owned, occupied or used by the Client, or any premises where the Equipment is situated and take possession of the Equipment, without being responsible for any damage thereby caused.
- 20.3 The Client is not authorised to pledge the Company's credit for repairs to the Equipment or to create a lien over the Equipment in respect of any repairs.

21. Risk

- 21.1 The Company retains property in the Equipment nonetheless all risk for the Equipment passes to the Client on delivery.
- 21.2 The Client accepts full responsibility for the safekeeping of the Equipment and indemnifies the Company for all loss, theft, or damage to the Equipment howsoever caused and without limiting the generality of the foregoing whether or not such loss, theft, or damage is attributable to any negligence, failure, or omission of the Client.
- 21.3 The Client will insure, or self insure, the Company's interest in the Equipment against physical loss or damage including, but not limited to, the perils of accident, fire, theft and burglary and all other usual risks and will effect adequate Public Liability Insurance covering any loss, damage or injury to property arising out of the Equipment. Further the Client will not use the Equipment nor permit it to be used in such a manner as would permit an insurer to decline any claim.
- 21.4 The Client accepts full responsibility for and shall keep the Company indemnified against all liability in respect of all actions, proceedings, claims, damages, costs and expenses in respect of any injury to persons or damage to property arising out of the use of the Equipment during the hire period however arising and whether or not arising from any negligence, failure or omission of the Client or any other persons.

22. Hirer's Responsibilities

- 22.1 The Client shall:
 - (a) notify the Company immediately by telephone of the full circumstances of any mechanical breakdown or accident. The Client is not absolved from the requirements to safeguard the Equipment by giving such notification; and
 - (b) satisfy itself at commencement that the Equipment is suitable for its purposes; and
 - (c) operate the Equipment safely, strictly in accordance with the law, only for its intended use, and in accordance with any manufacturer's instruction whether supplied by the Company or posted on the Equipment; and
 - (d) ensure that all persons operating the Equipment are suitably instructed in its safe and proper use and are fully licensed to operate the Equipment, and shall provide evidence of the same to the Company upon request; and
 - (e) comply with all occupational health and safety laws relating to the Equipment and its operation; and
 - (f) on termination of the hire, ensure the Equipment is complete with all parts and accessories, clean and in good order as delivered, fair wear and tear accepted; and
 - (g) keep the Equipment in their own possession and control and shall not assign the benefit of the hire contract nor be entitled to lien over the Equipment; and
 - (h) not alter or make any additions to the Equipment including but without limitation altering, make any additions to, defacing or erasing any identifying mark, plate or number on or in the Equipment or in any other manner interfere with the Equipment; and
 - (i) employ the Equipment solely in its own work and shall not permit the Equipment of any part thereof to be used by any other party for any other work.
- 22.2 Immediately on request by the Company the Client will pay:
 - (a) the new list price of any Equipment that is for whatever reason destroyed, written off or not returned to the Company; and
 - (b) all costs incurred in cleaning the Equipment; and
 - (c) all costs of repairing any damage caused by the ordinary use of the Equipment up to an amount equal to ten percent (10%) of the new list price of the Equipment; and
 - (d) the cost of repairing any damage to the Equipment caused by the negligence of the Client or the Client's agent; and
 - (e) the cost of repairing any damage to the Equipment caused by vandalism, or (in the Company's reasonable opinion) in any way whatsoever other than by the ordinary use of the Equipment by the Client; and
 - (f) the cost of fuels and consumables provided by the Company and used by the Client.

23. Wet Hire

- 23.1 In the event of "wet" hire of the Equipment the operator of the Equipment remains an employee of the Company and operates the Equipment in accordance with the Client's instructions. As such the Company shall not be liable for any actions of the operator in following the Client's instructions.

24. Defects

- 24.1 The Hirer shall inspect the Equipment on delivery and shall within forty eight (48) hours notify the Company of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote.

25. Warranty

- 25.1 No Warranty is provided by the Company in respect of the condition of the Equipment or its fitness for any particular purpose. The Client shall indemnify and hold harmless the Company in respect of all claims arising out of use of the Equipment.