

**1. Definitions**

- 1.1 “Manufacturer” shall mean A.D. McCallum & Son Pty Ltd its successors and assigns or any person acting on behalf of and with the authority of A.D. McCallum & Son Pty Ltd.
- 1.2 “Customer” shall mean the Customer (or any person acting on behalf of and with the authority of the Customer) as described on any quotation, work authorisation or other form as provided by the Manufacturer to the Customer.
- 1.3 “Guarantor” means that person (or persons), or entity, who agrees to be liable for the debts of the Customer on a principal debtor basis.
- 1.4 “Goods” shall mean Goods supplied by the Manufacturer to the Customer (and where the context so permits shall include any supply of Services as hereinafter defined) and are as described on the invoices, quotation, work authorisation or any other forms as provided by the Manufacturer to the Customer.
- 1.5 “Services” shall mean all Services supplied by the Manufacturer to the Customer and includes any advice or recommendations (and where the context so permits shall include any supply of Goods as defined above).
- 1.6 “Price” shall mean the price payable for the Goods as agreed between the Manufacturer and the Customer 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 Manufacturer from the Customer for the supply of Goods and/or the Customer’s acceptance of Goods supplied by the Manufacturer shall constitute acceptance of the terms and conditions contained herein.
- 3.2 Where more than one Customer has entered into this agreement, the Customers shall be jointly and severally liable for all payments of the Price.
- 3.3 Upon acceptance of these terms and conditions by the Customer the terms and conditions are binding and can only be amended with the written consent of the Manufacturer.
- 3.4 The Customer shall give the Manufacturer not less than fourteen (14) days prior written notice of any proposed change of ownership of the Customer or any change in the Customer’s name and/or any other change in the Customer’s details (including but not limited to, changes in the Customer’s address, facsimile number, or business practice). The Customer shall be liable for any loss incurred by the Manufacturer as a result of the Customer’s failure to comply with this clause.
- 3.5 Goods are supplied by the Manufacturer only on the terms and conditions of trade herein to the exclusion of anything to the contrary in the terms of the Customer’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 Manufacturer’s sole discretion the Price shall be either:
  - (a) as indicated on quotations and/or invoices provided by the Manufacturer to the Customer in respect of Goods supplied; or
  - (b) the Manufacturer’s current price at the date of delivery of the Goods according to the Manufacturer’s current Price list; or
  - (c) the Manufacturer’s quoted Price (subject to clause 4.2) which shall be binding upon the Manufacturer provided that the Customer shall accept the Manufacturer’s quotation in writing within thirty (30) days.
- 4.2 The Manufacturer reserves the right to change the Price in the event of a variation to the Manufacturer’s quotation.
- 4.3 At the Manufacturer’s sole discretion a deposit may be required.
- 4.4 At the Manufacturer’s sole discretion:
  - (a) payment shall be due on delivery of the Goods; or
  - (b) payment for approved Customers shall be made by instalments in accordance with the Manufacturer’s payment schedule; or
  - (c) payment for approved Customers shall be due thirty (30) days following the end of the month in which a statement is posted to the Customer’s address or address for notices.
- 4.5 Time for payment for the Goods 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 seven (7) days following the date of the invoice.
- 4.6 Payment will be made by cash, or by cheque, or by direct credit, or by any other method as agreed to between the Customer and the Manufacturer.
- 4.7 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 Of Goods**

- 5.1 At the Manufacturer’s sole discretion delivery of the Goods shall take place when:
  - (a) the Customer takes possession of the Goods at the Manufacturer’s address; or
  - (b) the Customer takes possession of the Goods at the Customer’s nominated address (in the event that the Goods are delivered by the Manufacturer or the Manufacturer’s nominated carrier); or

- (c) the Customer's nominated carrier takes possession of the Goods in which event the carrier shall be deemed to be the Customer's agent.
- 5.2 At the Manufacturer's sole discretion the costs of delivery are:
- (a) included in the Price; or
  - (b) in addition to the Price; or
  - (c) for the Customer's account.
- 5.3 The Customer shall make all arrangements necessary to take delivery of the Goods whenever they are tendered for delivery. In the event that the Customer is unable to take delivery of the Goods as arranged then the Manufacturer shall be entitled to charge a reasonable fee for redelivery.
- 5.4 Delivery of the Goods to a third party nominated by the Customer is deemed to be delivery to the Customer for the purposes of this agreement.
- 5.5 The Manufacturer may deliver the Goods by separate instalments. Each separate instalment shall be invoiced and paid in accordance with the provisions in these terms and conditions.
- 5.6 The failure of the Manufacturer to deliver shall not entitle either party to treat this contract as repudiated.
- 5.7 The Manufacturer shall not be liable for any loss or damage whatever due to failure by the Manufacturer to deliver the Goods (or any of them) promptly or at all, where due to circumstances beyond the control of the Manufacturer.

## **6. Risk**

- 6.1 If the Manufacturer retains ownership of the Goods nonetheless, all risk for the Goods passes to the Customer on delivery.
- 6.2 If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Customer, the Manufacturer is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by the Manufacturer is sufficient evidence of the Manufacturer's rights to receive the insurance proceeds without the need for any person dealing with the Manufacturer to make further enquiries.

## **7. Title**

- 7.1 The Manufacturer and the Customer agree that ownership of the Goods shall not pass until:
- (a) the Customer has paid the Manufacturer all amounts owing for the particular Goods; and
  - (b) the Customer has met all other obligations due by the Customer to the Manufacturer in respect of all contracts between the Manufacturer and the Customer.
- 7.2 Receipt by the Manufacturer 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 Manufacturer's ownership or rights in respect of the Goods shall continue.
- 7.3 It is further agreed that:
- (a) where practicable the Goods shall be kept separate and identifiable until the Manufacturer shall have received payment and all other obligations of the Customer are met; and
  - (b) until such time as ownership of the Goods shall pass from the Manufacturer to the Customer the Manufacturer may give notice in writing to the Customer to return the Goods or any of them to the Manufacturer. Upon such notice the rights of the Customer to obtain ownership or any other interest in the Goods shall cease; and
  - (c) the Manufacturer shall have the right of stopping the Goods in transit whether or not delivery has been made; and
  - (d) if the Customer fails to return the Goods to the Manufacturer then the Manufacturer or the Manufacturer's agent may enter upon and into land and premises owned, occupied or used by the Customer, or any premises as the invitee of the Customer, where the Goods are situated and take possession of the Goods; and
  - (e) the Customer is only a bailee of the Goods and until such time as the Manufacturer has received payment in full for the Goods then the Customer shall hold any proceeds from the sale or disposal of the Goods, up to and including the amount the Customer owes to the Manufacturer for the Goods, on trust for the Manufacturer; and
  - (f) the Customer shall not deal with the money of the Manufacturer in any way which may be adverse to the Manufacturer; and
  - (g) the Customer 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 Manufacturer; and
  - (h) the Manufacturer can issue proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods may not have passed to the Customer; and
  - (i) until such time that ownership in the Goods passes to the Customer, if the Goods are converted into other products, the parties agree that the Manufacturer will be the owner of the end products.

## **8. Defects**

- 8.1 The Customer shall inspect the Goods on delivery and shall within seven (7) days of delivery (time being of the essence) notify the Manufacturer of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Customer shall afford the Manufacturer an opportunity to inspect the Goods within a reasonable time following delivery if the Customer believes the Goods are defective in any way. If the Customer shall fail to comply with these provisions the Goods shall be presumed to be free from any defect or damage. For defective Goods, which the Manufacturer has agreed in writing that the Customer is entitled to reject, the Manufacturer's liability is limited to either (at the Manufacturer's discretion) replacing the Goods or repairing the Goods except where the Customer has acquired Goods as a consumer within the meaning of the Trade Practices Act 1974 (Cwth) 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 purchase price of the Goods, or repair of the Goods, or replacement of the Goods.

8.2 Goods will not be accepted for return other than in accordance with 8.1 above.

## 9. Warranty

9.1 Subject to the conditions of warranty set out in clause 9.2 the Manufacturer warrants that if any defect in any workmanship of the Manufacturer becomes apparent and is reported to the Manufacturer within either six (6) months for any earthmoving and digging machinery and any components relating to such Goods or twelve (12) months for all other Goods from the date of delivery (time being of the essence) then the Manufacturer will either (at the Manufacturer's sole discretion) replace or remedy the workmanship.

9.2 The conditions applicable to the warranty given by clause 9.1 are:

- (a) the warranty shall not cover any defect or damage which may be caused or partly caused by or arise through:
  - (i) failure on the part of the Customer to properly maintain any Goods; or
  - (ii) failure on the part of the Customer to follow any instructions or guidelines provided by the Manufacturer; or
  - (iii) any use of any Goods otherwise than for any application specified on a quote or order form; or
  - (iv) the continued use of any Goods after any defect becomes apparent or would have become apparent to a reasonably prudent operator or user; or
  - (v) fair wear and tear, any accident or act of God.

(b) the warranty shall cease and the Manufacturer shall thereafter in no circumstances be liable under the terms of the warranty if the workmanship is repaired, altered or overhauled without the Manufacturer's consent.

(c) in respect of all claims the Manufacturer shall not be liable to compensate the Customer for any delay in either replacing or remedying the workmanship or in properly assessing the Customer's claim.

9.3 To the extent permitted by statute, no warranty is given by the Manufacturer for Goods that are repaired and/or where maintenance is carried out unless specified at the time of quotation. The Manufacturer shall not be responsible for any loss or damage to the Goods, or caused by the Goods, or any part thereof however arising.

9.4 In the event the customer desires to return any goods to the manufacturer within the terms of this warranty then the cost of transportation of those goods to the manufacturer will be the responsibility of the customer.

## 10. Intellectual Property

10.1 Where the Manufacturer has designed, drawn or written Goods for the Customer, then the copyright in those designs and drawings and documents shall remain vested in the Manufacturer, and shall only be used by the Customer at the Manufacturer's discretion.

10.2 The Customer warrants that all designs or instructions to the Manufacturer will not cause the Manufacturer to infringe any patent, registered design or trademark in the execution of the Customer's order and the Customer agrees to indemnify the Manufacturer against any action taken by a third party against the Manufacturer in respect of any such infringement.

10.3 Where any designs or specifications have been supplied by the Customer for manufacture, by or to the order of the Manufacturer then the Customer warrants that the use of those designs or specifications for the manufacture, processing, assembly or supply of the Goods shall not infringe the rights of any third party.

## 11. Default & Consequences of Default

11.1 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 one half percent (2.5%) per calendar month (and at the Manufacturer's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.

11.2 In the event that the Customer's payment is dishonoured for any reason the Customer shall be liable for any dishonour fees incurred by the Manufacturer.

11.3 If the Customer defaults in payment of any invoice when due, the Customer shall indemnify the Manufacturer from and against all costs and disbursements incurred by the Manufacturer in pursuing the debt including legal costs on a solicitor and own client basis and the Manufacturer's collection agency costs.

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

11.5 If any account remains overdue after thirty (30) 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.

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

- (a) any money payable to the Manufacturer becomes overdue, or in the Manufacturer's opinion the Customer will be unable to meet its payments as they fall due; or
- (b) the Customer becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
- (c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Customer or any asset of the Customer.

## **12. Security And Charge**

- 12.1 Despite anything to the contrary contained herein or any other rights which the Manufacturer may have howsoever:
- (a) where the Customer and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Customer 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 Manufacturer or the Manufacturer's nominee to secure all amounts and other monetary obligations payable under these terms and conditions. The Customer and/or the Guarantor acknowledge and agree that the Manufacturer (or the Manufacturer'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 Manufacturer elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Customer and/or Guarantor shall indemnify the Manufacturer from and against all the Manufacturer's costs and disbursements including legal costs on a solicitor and own client basis.
  - (c) the Customer and/or the Guarantor (if any) agree to irrevocably nominate constitute and appoint the Manufacturer or the Manufacturer's nominee as the Customer's and/or Guarantor's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause 12.1.

## **13. Cancellation**

- 13.1 The Manufacturer may cancel any contract to which these terms and conditions apply or cancel delivery of Goods at any time before the Goods are delivered by giving written notice to the Customer. On giving such notice the Manufacturer shall repay to the Customer any sums paid in respect of the Price. The Manufacturer shall not be liable for any loss or damage whatever arising from such cancellation.
- 13.2 In the event that the Customer cancels delivery of Goods the Customer shall be liable for any loss incurred by the Manufacturer (including, but not limited to, any loss of profits) up to the time of cancellation.

## **14. Privacy Act 1988**

- 14.1 The Customer and/or the Guarantor/s agree for the Manufacturer to obtain from a credit reporting agency a credit report containing personal credit information about the Customer and Guarantor/s in relation to credit provided by the Manufacturer.
- 14.2 The Customer and/or the Guarantor/s agree that the Manufacturer may exchange information about the Customer and the Guarantor/s with those credit providers either named as trade referees by the Customer or named in a consumer credit report issued by a credit reporting agency for the following purposes:
- (a) to assess an application by Customer; and/or
  - (b) to notify other credit providers of a default by the Customer; and/or
  - (c) to exchange information with other credit providers as to the status of this credit account, where the Customer is in default with other credit providers; and/or
  - (d) to assess the credit worthiness of Customer and/or Guarantor/s.
- 14.3 The Customer consents to the Manufacturer being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988).
- 14.4 The Customer agrees that personal credit information provided may be used and retained by the Manufacturer for the following purposes and for other purposes as shall be agreed between the Customer and Manufacturer or required by law from time to time:
- (a) provision of Goods; and/or
  - (b) marketing of Goods by the Manufacturer, its agents or distributors in relation to the Goods; and/or
  - (c) analysing, verifying and/or checking the Customer's credit, payment and/or status in relation to provision of Goods; and/or
  - (d) processing of any payment instructions, direct debit facilities and/or credit facilities requested by Customer; and/or
  - (e) enabling the daily operation of Customer's account and/or the collection of amounts outstanding in the Customer's account in relation to the Goods.
- 14.5 The Manufacturer may give information about the Customer to a credit reporting agency for the following purposes:
- (a) to obtain a consumer credit report about the Customer; and/or
  - (b) allow the credit reporting agency to create or maintain a credit information file containing information about the Customer.

## **15. Unpaid Manufacturer's Rights**

- 15.1 Where the Customer has left any item with the Manufacturer for repair, modification, exchange or for the Manufacturer to perform any other Service in relation to the item and the Manufacturer has not received or been tendered the whole of the Price, or the payment has been dishonoured, the Manufacturer shall have:
- (a) a lien on the item;
  - (b) the right to retain the item for the Price while the Manufacturer is in possession of the item;
  - (c) a right to sell the item.
- 15.2 The lien of the Manufacturer shall continue despite the commencement of proceedings, or judgment for the Price having been obtained.

## **16. Building and Construction Industry Security of Payments Act 1999**

- 16.1 At the Manufacturer'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 New South Wales.
- 17.3 The Manufacturer shall be under no liability whatever to the Customer for any indirect loss and/or expense (including loss of profit) suffered by the Customer arising out of a breach by the Manufacturer of these terms and conditions.
- 17.4 In the event of any breach of this contract by the Manufacturer the remedies of the Customer shall be limited to damages which under no circumstances shall exceed the Price of the Goods.
- 17.5 The Customer shall not be entitled to set off against or deduct from the Price any sums owed or claimed to be owed to the Customer by the Manufacturer.
- 17.6 The Manufacturer may license or sub-contract all or any part of its rights and obligations without the Customer's consent.
- 17.7 The Customer agrees that the Manufacturer 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 Manufacturer notifies the Customer 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 Manufacturer to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect the Manufacturer's right to subsequently enforce that provision.