

1. Definitions

- 1.1 "Seller" shall mean Formark Limited and its successors and assigns.
- 1.2 "Customer" shall mean the Customer or any person acting on behalf of and with the authority of the Customer.
- 1.3 "Guarantor" means that person (or persons), or entity that agrees herein to be liable for the debts of the Customer on a principal debtor basis.
- 1.4 "Goods" are goods supplied by the Seller to the Customer including but not limited to hydraulic rams, cylinders and parts (and where the context so permits shall include any supply of Services as hereinafter defined).
- 1.5 "Services" shall mean all services supplied by the Seller 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 cost of the Goods as agreed between the Seller and the Customer subject to clause 4 of this contract.

2. Acceptance

- 2.1 Any instructions received by the Seller from the Customer for the supply of Goods and/or the Customer's acceptance of Goods supplied by the Seller shall constitute acceptance of the terms and conditions contained herein.
- 2.2 Where more than one Customer has entered into this agreement, the Customers shall be jointly and severally liable for all payments of the Price.
- 2.3 Upon acceptance of these terms and conditions by the Customer the terms and conditions are irrevocable and can only be rescinded in accordance with these terms and conditions or with the written consent of the manager of the Seller.
- 2.4 None of the Seller's agents or representatives are authorised to make any representations, statements, conditions or agreements not expressed by the manager of the Seller in writing nor is the Seller bound by any such unauthorised statements.

3. Goods / Services

- 3.1 The Goods and/or Services are as described on the invoices, quotation, work authorisation or any other work commencement forms as provided by the Seller to the Customer.

4. Price And Payment

- 4.1 At the Seller's sole discretion the Price shall be either;
 - (a) as indicated on invoices provided by the Seller to the Customer in respect of Goods supplied; or
 - (b) the Seller's current Price, at the date of delivery of the Goods, according to the Seller's current Price list; or
 - (c) Seller's quoted Price (subject to clause 4.2) which shall be binding upon the Seller provided that the Customer shall accept in writing the Seller's quotation within thirty (30) days.
- 4.2 Any variation from the plan of scheduled works or specifications will be charged for on the basis of the Seller's quotation and will be shown as extras on the invoice. Payment for all extras must be made in full at their time of completion.
- 4.3 Time for payment for the Goods shall be of the essence and will be stated on the invoice, quotation or any other order forms. If no time is stated then payment shall be on delivery of the Goods.
- 4.4 The Seller may withhold delivery of the Goods until the Customer has paid for them, in which event payment shall be made before the delivery date.
- 4.5 At the Seller's sole discretion, payment for approved Customers shall be due twenty (20) days following the end of the month in which a statement is posted to the Customer's address or address for notices.
- 4.6 At the Seller's sole discretion, for certain approved Customers payment will be due seven (7) days following the date of the invoice.
- 4.7 Payment will be made by cash on delivery, or by cheque, or by bank cheque, or by direct credit, or by any other method as agreed to between the Customer and the Seller.
- 4.8 The Price shall be increased by the amount of any GST and other taxes and duties which may be applicable, except to the extent that such taxes are expressly included in any quotation given by the Seller.

5. Delivery Of Goods

- 5.1 Delivery of the Goods shall be made to the Customer's address. The Customer shall make all arrangements necessary to take delivery of the Goods whenever they are tendered for delivery, or delivery of the Goods shall be made to the Customer at the Seller's address.
- 5.2 Delivery of the Goods to a carrier, either named by the Customer or failing such naming to a carrier at the discretion of the Seller for the purpose of transmission to the Customer, is deemed to be a delivery of the Goods to the Customer.
- 5.3 The costs of carriage and any insurance which the Customer reasonably directs the Seller to incur, shall be reimbursed by the Customer (without any set-off or other withholding whatever) and shall be due on the date for payment of the Price. The carrier shall be deemed to be the Customer's agent.
- 5.4 Where there is no agreement that the Seller shall send the Goods to the Customer, delivery to a carrier at limited carrier's risk at the expense of the Customer is deemed to be delivery to the Customer.
- 5.5 The Seller may deliver the Goods by separate instalments (in accordance with the agreed delivery schedule). Each separate instalment shall be invoiced and paid for in accordance with the provisions in this contract of sale.
- 5.6 The failure of the Seller to deliver shall not entitle either party to treat this contract as repudiated.
- 5.7 The Seller shall not be liable for any loss or damage whatever due to failure by the Seller to deliver the Goods (or any of them) promptly or at all.

6. Risk

- 6.1 If the Seller retains title to 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 prior to title to them passing to the Customer, the Seller is entitled, without prejudice to any of its other rights or remedies under these terms and conditions (including the right to receive payment of the balance of the Price for the Goods), to receive all insurance proceeds payable in respect of the Goods. This applies whether or not the Price has become payable under these terms and conditions. The production of these terms and conditions by the Seller is sufficient evidence of the Seller's rights to receive the insurance proceeds without the need for any person dealing with the Seller to make further enquiries.

7. Defects/Returns

- 7.1 The Customer shall inspect the Goods on delivery and shall within twenty-one (21) days of delivery notify the Seller of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Customer shall afford the Seller 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 conclusively presumed to be in accordance with the terms and conditions and free from any defect or damage.
- 7.2 For defective Goods, which the Seller has agreed in writing that the Customer is entitled to reject, the Seller's liability is limited to either (at the Seller's discretion) replacing the Goods or repairing the Goods provided that:
- (a) the Customer has complied with the provisions of clause 7.1;
 - (b) the Goods are returned at the Customer's cost within fourteen (14) days of the delivery date;
 - (c) the Seller will not be liable for Goods which have not been stored or used in a proper manner;
 - (d) the Goods are returned in the condition in which they were delivered and with all packaging material, brochures and instruction material in as new condition as is reasonably possible in the circumstances.
- 7.3 The Seller may (in its discretion) accept the Goods for credit but this may incur a handling fee of 10% of the value of the returned Goods plus any freight.

8. Warranty

- 8.1 Subject to the conditions of warranty set out in Clause 8.2 the Seller warrants that if any defect in Goods manufactured by the Seller becomes apparent and is reported to the Seller within 2 years of delivery, the Seller will either (at the Seller's sole discretion) repair or replace the defective Goods.
- 8.2 The conditions applicable to the warranty given by Clause 8.1 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 Seller; 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 Seller shall thereafter in no circumstances be liable under the terms of the warranty if the Goods are repaired, altered or overhauled without the Seller's consent; and
 - (c) in respect of all claims the Seller shall not be liable to compensate the Customer for any delay in either replacing or repairing the Goods or in properly assessing the Customer's claim.
- 8.3 For Goods not manufactured by the Seller, the warranty shall be the current warranty provided by the manufacturer of the Goods. The Seller shall not be bound by nor responsible for any term, condition, representation or warranty given by the manufacturer of the Goods.
- 8.4 In the case of second hand Goods, the Customer acknowledges that he has had full opportunity to inspect the same and that he accepts the same with all faults and that no warranty is given by the Seller as to the quality or suitability for any purpose and any implied warranty, statutory or otherwise, is expressly excluded. The Seller shall not be responsible for any loss or damage to the Goods, or caused by the Goods, or any part thereof however arising.

9. Default & Consequences Of Default

- 9.1 Interest on overdue invoices shall accrue from the date when payment becomes due daily until the date of payment at a rate of 2.5% compounding per calendar month and shall accrue at such a rate after as well as before any judgement.
- 9.2 If the Customer defaults in payment of any invoice when due, the Customer shall indemnify the Seller from and against all of the Seller's costs and disbursements including on a solicitor and own client basis and in addition all of the Seller's collection agency costs.
- 9.3 Without prejudice to any other remedies the Seller may have, if at any time the Customer is in breach of any obligation (including those relating to payment), the Seller may suspend or terminate the supply of Goods to the Customer and any of its other obligations under the terms and conditions. The Seller will not be liable to the Customer for any loss or damage the Customer suffers because the Seller exercised its rights under this clause.
- 9.4 If any account remains unpaid at the end of the second month after supply of the Goods or Services the following shall apply: An immediate amount of \$100.00 shall be levied for administration fees which sum shall become immediately due and payable in addition to the interest payable under clause 9.1 hereof.
- 9.5 In the event that:
- (a) any money payable to the Seller becomes overdue, or in the Seller's opinion the Customer will be unable to meet its payments as they fall due, or;

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- (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,
then without prejudice to the Seller's other remedies at law;
- (d) the Seller shall be entitled to cancel all or any part of any order of the Customer which remains unperformed in addition to and without prejudice to any other remedies; and
- (e) all amounts owing to the Seller shall, whether or not due for payment, immediately become due and payable.

10. Title

- 10.1 It is the intention of the Seller and agreed by the Customer that property in the Goods shall not pass until:
 - (a) The Customer has paid all amounts owing for the particular Goods, and
 - (b) The Customer has met all other obligations due by the Customer to the Seller in respect of all contracts between the Seller and the Customer, and that the Goods, or proceeds of the sale of the Goods, shall be kept separate until the Seller shall have received payment and all other obligations of the Customer are met.
- 10.2 Receipt by the Seller 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 Seller's ownership of rights in respect of the Goods shall continue.
- 10.3 It is further agreed that:
 - (a) Until such time as ownership of the Goods shall pass from the Seller to the Customer the Seller may give notice in writing to the Customer to return the Goods or any of them to the Seller. Upon such notice the rights of the Customer to obtain ownership or any other interest in the Goods shall cease.
 - (b) If the Customer fails to return the Goods to the Seller then the Seller or the Seller'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, without being responsible for any damage thereby caused.

11. Personal Property Securities Act 1999 ("PPSA")

- 11.1 Upon assenting to these terms and conditions in writing the Customer acknowledges and agrees that:
 - (a) these terms and conditions constitute a security agreement for the purposes of the PPSA; and
 - (b) a security interest is taken in all Goods previously supplied by the Seller to the Customer (if any) and all Goods that will be supplied in the future by the Seller to the Customer during the continuance of the parties relationship.
- 11.2 The Customer undertakes to:
 - (a) sign any further documents and/or provide any further information, such information to be complete, accurate and up-to-date in all respects, which the Seller may reasonably require to register a financing statement or financing change statement on the Personal Property Securities Register;
 - (b) indemnify, and upon demand reimburse, the Seller for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register or releasing any Goods charged thereby;
 - (c) not register a financing change statement or a change demand without the prior written consent of the Seller;
 - (d) give the Seller not less than fourteen (14) days prior written notice of any proposed 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); and
 - (e) immediately advise the Seller of any material change in its business practices of selling the Goods which would result in a change in the nature of proceeds derived from such sales.
- 11.3 The Seller and the Customer agree that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to these Terms and Conditions.
- 11.4 The Customer waives its rights as a debtor under sections 116, 120(2), 121, 125, 126, 127, 129, and 131 of the PPSA.
- 11.5 Unless otherwise agreed to in writing by the Seller, the Customer waives its right to receive a verification statement in accordance with section 148 of the PPSA.
- 11.6 The Customer unconditionally ratifies any actions taken by the Seller under clauses 11.1 to 11.5. under and by virtue of the power of attorney given by the Customer to the Seller.

12. Security & Charge

- 12.1 Despite anything to the contrary contained herein or any other rights which the Seller may have howsoever:
 - (a) Where the Customer and/or the Guarantor (if any) is the owner of land, realty or any other asset (including all present and after acquired real or personal property) 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 Seller or the Seller's nominee to secure all amounts and other monetary obligations payable under the terms and conditions. The terms of the charge are the terms of Memorandum 2018/4344 registered pursuant to s.209 of the Land Transfer Act 2017.
 - (b) Should the Seller elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Customer and/or Guarantor shall indemnify the Seller from and against all the Seller's costs and disbursements including legal costs on a solicitor and own client basis.
 - (c) To give effect to the provisions of clause 11, 12.1(a) to (b) inclusive hereof the Customer and/or the Guarantor (if any) do hereby irrevocably nominate constitute and appoint the Seller or the Seller's nominee as the Customer's and/or Guarantor's true and lawful attorney to execute mortgages and charges (whether registerable or not)

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including such other terms and conditions as the Seller and/or the Seller's nominee shall think fit in his/her/its/their absolute discretion against the joint and/or several interest of the Customer and/or the Guarantor in any land, realty or asset in favour of the Seller and in the Customer's and/or Guarantor's name as may be necessary to secure the said Customer's and/or Guarantor's obligations and indebtedness to the Seller and further to do and perform all necessary and other acts including instituting any necessary legal proceedings, and further to execute all or any documents in the Seller's absolute discretion which may be necessary or advantageous to give effect to the provisions of this clause.

13. Intellectual property

- 13.1 Where the Seller has designed or drawn Goods for the Customer, then the copyright in those designs and drawings shall remain vested in the Seller, and shall only be used by the Customer at the Seller's discretion.
- 13.2 The Customer warrants that all designs or instructions to the Seller will not cause the Seller to infringe any patent, registered design, trademark, copyright or other intellectual property in the execution of the Customer's order.

14. Cancellation

- 14.1 The Seller may cancel these terms and conditions or cancel delivery of Goods and Services at any time before the Goods are delivered by giving written notice. On giving such notice the Seller shall promptly repay to the Customer any sums paid in respect of the Price for those Goods. The Seller shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 14.2 At the Seller's sole discretion the Customer may cancel delivery of Goods and/or Services. In the event that the Customer cancels delivery of Goods and/or Services the Customer shall be liable for any costs incurred by the Seller up to the time of cancellation.

15. Privacy Act 2020

- 15.1 The Customer and the Guarantor/s authorises the Seller to:
- (a) collect, retain and use any information about the Customer/Guarantor, for the purpose of assessing the Customer/Guarantor's creditworthiness or marketing products and services; and
 - (b) to disclose information about the Customer/Guarantor, whether collected by the Seller from the Customer/Guarantor directly or obtained by the Seller from any other source, to any other credit provider or any credit reporting agency for the purposes of providing or obtaining a credit reference, debt collection or notifying a default by the Customer/Guarantor.
- 15.2 Where the Customer/Guarantor is a natural person the authorities under (clause 15.1) are authorities or consents for the purposes of the Privacy Act 2020.
- 15.3 The Customer/Guarantor shall have the right to request the Seller for a copy of the information about the Customer/Guarantor retained by the Seller and the right to request the Seller to correct any incorrect information about the Customer/Guarantor held by the Seller.

16. Customer's Disclaimer

- 16.1 The Customer hereby disclaims any right to rescind, or cancel the contract or to sue for damages or to claim restitution arising out of any misrepresentation made to him by any servant or agent of the Seller and the Customer acknowledges that he buys the Goods relying solely upon his own skill and judgement.

17. Unpaid Seller's Rights To Dispose Of Goods

- 17.1 In the event that:
- (a) the Seller retains possession or control of the Goods; and
 - (b) payment of the Price is due to the Seller; and
 - (c) the Seller has made demand in writing of the Customer for payment of the Price in terms of this contract; and
 - (d) the Seller has not received the Price of the Goods,
- then, whether the title in the Goods has passed to the Customer or has remained with the Seller, the Seller may dispose of the Goods and may claim from the Customer the loss to the Seller on such disposal.

18. Consumer Guarantees Act 1993

- 18.1 If the Customer is buying Goods for the purpose of a trade or business, the provisions of the Consumer Guarantees Act 1993 do not apply to the supply of the Goods by the Seller to the Customer.

19. General

- 19.1 If any provision of these terms and conditions shall be invalid, void or illegal or unenforceable the validity existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 19.2 All Goods and Services supplied by the Seller are supplied subject to the laws of New Zealand and the Seller takes no responsibility for changes in the law that affect the Goods or Services supplied.
- 19.3 The Seller shall be under no liability whatsoever to the Customer for any loss or damage (including loss of profit) suffered by the Customer arising out of a breach by the Seller of these terms and conditions. The Seller's liability shall be limited to the obligations in clauses 7 and 8.
- 19.4 In the event of any breach of this contract by the Seller the remedies of the Customer shall be limited to damages. Under no circumstances shall the liability of the Seller exceed the Price of the Goods.

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- 19.5 Neither party shall be liable for any default due to any act of God, terrorism, war, strike, lock out, industrial action, flood, storm or other event beyond the reasonable control of either party.
- 19.6 The Customer shall not set off against the Price amounts due from the Seller.
- 19.7 The Seller may license or sub-contract all or any part of its rights and obligations without the Customer's consent.
- 19.8 The Seller reserves the right to review these terms and conditions at any time and from time to time. If, following any such review, there is to be any change in such terms and conditions, that change will take effect from the date on which the Seller notifies the Customer of such change.