

DRUMMOND & ETHERIDGE – TERMS AND CONDITIONS OF TRADE

- 1. Definitions**
 - 1.1 "Seller" shall mean those companies comprising the D&E group of companies including Drummond & Etheridge Limited, D&E Christchurch Limited together with any other subsidiary and/or related company of Drummond & Etheridge Limited from time to time.
 - 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 Seller 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 Goods supplied by the Seller to the Client [and where the context so permits shall include any supply of Services as hereinafter defined] and includes Goods described on any invoices, quotation, work authorisation or any other forms as provided by the Seller to the Client.
 - 1.5 "Services" shall mean all services supplied by the Seller to the Client 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 Seller and the Client in accordance with clause 3 of this Contract.
- 2. Acceptance**
 - 2.1 Any instructions received by the Seller from the Client for the supply of Goods and/or the Client's acceptance of Goods supplied by the Seller shall constitute acceptance of the terms and conditions herein.
 - 2.2 Where more than one Client has entered into this Agreement, the Clients shall be jointly and severally liable for all payments of the Price.
 - 2.3 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 Seller.
 - 2.4 The Seller shall give the Seller 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 Seller as a result of the Client's failure to comply with this clause.
- 3. Price and Payment**
 - 3.1 At the Seller's sole discretion the Price shall be either:
 - [a] as indicated on invoices provided by the Seller to the Client in respect of Goods supplied; or
 - [b] the Seller's quoted Price [subject to clause 3.2] which shall be binding upon the Seller provided that the Client shall accept the Seller's quotation in writing within thirty [30] days.
 - 3.2 The Seller reserves the right to change the Price in the event of a variation to the Seller's quotation [including, but not limited to, variations in the Price due to circumstances beyond the control of the Seller].
 - 3.3 At the Seller's sole discretion a deposit may be required.
 - 3.4 The Seller may submit a detailed payment claim at intervals not less than one month for work performed up to the end of each month. The value of work so performed shall include the reasonable value of authorised variations, whether or not the value of such variations has been finally agreed between the parties, and the value of the materials delivered to the site but not installed. Progress payment shall be made within twenty [20] working days of each monthly payment claim.
 - 3.5 At the Seller's sole discretion:
 - [a] payment for approved Clients shall be made by instalments in accordance with the Seller's payment schedule; or
 - [b] payment for approved Clients shall be due twenty [20] days following the end of the month in which a statement is posted to the Client's address or address for notices.
 - 3.6 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 on the 20th of the month following the date of the invoice.
 - 3.7 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.
- 4. Delivery of Goods**
 - 4.1 At the Seller's sole discretion delivery of the Goods shall take place when the Client takes possession of the Goods at the Client's nominated address [in the event that the Goods are delivered by the Seller or the Seller's nominated carrier].
 - 4.2 At the Seller's sole discretion the costs of delivery are:
 - [a] in addition to the Price; or
 - [b] for the Client's account.
 - 4.3 The Client shall make all arrangements necessary to take delivery of the Goods whenever they are tendered for delivery. In the event that the Client is unable to take delivery of the Goods as arranged then the Seller shall be entitled to charge a reasonable fee for redelivery.
 - 4.4 Delivery of the Goods to a third party nominated by the Client is deemed to be delivery to the Client for the purposes of this agreement.
 - 4.5 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 5%; and
 - [b] the price shall be adjusted pro rata to the discrepancy.
 - 4.6 The failure of the Seller to deliver shall not entitle either party to treat this contract as repudiated.
 - 4.7 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.
- 5. Risk**
 - 5.1 If the Seller retains ownership of the Goods nonetheless, all risk for the Goods passes to the Client on delivery.
 - 5.2 If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Client, the Seller is entitled to receive all insurance proceeds payable for the Goods. 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.
- 6. Title**
 - 6.1 The Seller and Client agree that ownership of the Goods shall not pass until:
 - [a] the Client has paid the Seller all amounts owing for the particular Goods; and
 - [b] the Client has met all other obligations due by the Client to the Seller in respect of all contracts between the Seller and the Client.
 - 6.2 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 or rights in respect of the Goods shall continue.
 - 6.3 It is further agreed that:
 - [a] where practicable the Goods shall be kept separate and identifiable until the Seller 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 Seller to the Client the Seller may give notice in writing to the Client to return the Goods or any of them to the Seller. Upon such notice being given the rights of the Client to obtain ownership or any other interest in the Goods shall cease; and the Client is only a bailee of the Goods and until such time as the Seller has received payment in full for the Goods then the Client shall hold any proceeds from the sale or disposal of the Goods on trust for the Seller; and 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 Seller will be the owner of the end products; and
- [c] if the Client 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 Client, or any premises where the Goods are situated as the invitee of the Client and take possession of the Goods, and the Seller will not be liable for any reasonable loss or damage suffered as a result of any action by the Seller under this clause.
- 7. Personal Property Securities Act 1999 [PPSA]**
 - 7.1 Upon assenting to these terms and conditions in writing the Client 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 Client [if any] and all Goods that will be supplied in the future by the Seller to the Client.
 - 7.2 The Client 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 change demand without the prior written consent of the Seller; and
 - [d] immediately advise the Seller of any material damage in its business practices of selling the Goods which would result in a change in the nature of proceeds derived from such sales.
 - 7.3 The Seller and the Client agree that nothing in sections 114[1][a], 133 and 134 of the PPSA shall apply to these terms and conditions.
 - 7.4 The Client waives its right as a debtor under sections 116, 120[2], 121, 125, 126, 127, 129, 131 and 132 of the PPSA.
 - 7.5 Unless otherwise agreed to in writing by the Seller, the Client waives its right to receive a verification statement in accordance with section 148 of the PPSA.
 - 7.6 The Client shall unconditionally ratify any actions taken by the Seller under clauses 7.1 to 7.5.
- 8. Client's Disclaimer**
 - 8.1 The Client hereby disclaims any right to rescind, or cancel any contract with the Seller or to sue for damages or to claim restitution arising out of any inadvertent misrepresentation made to the Client by the Seller and the Client acknowledges that the Goods are bought relying solely upon the Client's skill and judgment.
- 9. Defects**
 - 9.1 The Client shall inspect the Goods on delivery and shall within seven [7] days of delivery [time being of the essence] notify the Seller of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Client shall afford the Seller an opportunity to inspect the Goods within a reasonable time following delivery if the Client believes the Goods are defective in any way. If the Client 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 Seller has agreed in writing that the Client is entitled to reject, the Seller's liability is limited to either [at the Seller's discretion] replacing the Goods or repairing the Goods.
- 10. Returns**
 - 10.1 Returns will only be accepted provided that:
 - [a] the Client has complied with the provisions of clause 9.1; and
 - [b] the Seller has agreed in writing to accept the return of the goods; and
 - [c] the Goods are returned at the Client's cost within ten [10] days of the delivery date; and
 - [d] the Seller will not be liable for Goods which have not been stored or used in a proper manner; and
 - [e] 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.
 - 10.2 The Seller may [in its discretion] accept the return of the Goods for credit, but this may incur a handling fee of ten percent [10%] of the value of the returned Goods, plus any freight.
- 11. Warranty**
 - 11.1 Subject to the conditions of warranty set out in clause 11.2 the Seller warrants that if any defect in any workmanship of the Seller becomes apparent and is reported to the Seller within three (3) months of the date of delivery [time being of the essence] then the Seller will either [at the Seller's sole discretion] replace or remedy the workmanship.
 - 11.2 The conditions applicable to the warranty given by clause 11.1 are:
 - [a] The warranty shall not cover any defect of damage which may be caused or partly caused by or arise through:
 - [i] Failure on the part of the Client to properly maintain the Goods; or
 - [ii] Failure on the part of the Client 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 workmanship is repaired, altered or overhauled without the Seller's consent.
 - [c] In respect of all claims the Seller shall not be liable to compensate the Client for any delay in either replacing or remedying the workmanship or in properly assessing the Client's claim.
 - 11.3 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 other than that which is given by the manufacturer of the Goods.
 - 11.4 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.
 - 11.5 In the case of used machinery, the warranty to be applied is as follows:
 - [a] John Deere tractors under 4000 hours
Will be covered under the D&E powertrain warranty, the cover is the same as the John Deere powertrain warranty and the term is 1000 hours or one year whatever comes first with an excess of \$500.
 - [b] Non-John Deere or John Deere tractors over 4000 hours
50/50 warranty (50% paid for by the Seller, 50% paid for by the customer) the cover will be for 3 months with a \$500 excess.
 - [c] Combine / forage harvesters
50/50 warranty (50% paid for by the Seller, 50% paid for by the customer) the cover will be for 3 months or 50 hours, with a \$500 excess.
 - [d] Hay equipment or any other equipment not covered by above
One month 50/50 warranty (50% paid for by the Seller, 50% paid for by the customer) start date nominated by client, if no date nominated default will be date of purchase, with a \$500 excess.
- 12. Consumer Guarantees Act 1993**
 - 12.1 If the Client is acquiring Goods for the purposes of trade or business, the Client acknowledges that the provisions of the Consumer Guarantees Act 1993 do not apply to the supply of Goods by the Seller to the Client.
- 13. Intellectual Property**
 - 13.1 Where the Seller has designed, drawn or written Goods for the Client, then the copyright in those designs and drawings and documents shall remain vested in the Seller, and shall only be used by the Client at the Seller's discretion.
 - 13.2 The Client warrants that all designs or instructions to the Seller will not cause the Seller to infringe any patent, registered design or trademark in the execution of the Client's order and the Client agrees to indemnify the Seller against any action taken by a Third Party against the Seller in respect of any such infringement.
- 14. Default & Consequences of Default**
 - 14.1 Interest on overdue invoices shall accrue from the date when payment becomes due daily until the date of payment at a rate of 2.0% per calendar month and such interest shall compound monthly at such a rate after as well as before any judgment.
 - 14.2 If the Client defaults in payment of any invoice when due, the Client shall indemnify the Seller from and against all costs and disbursements incurred by the Seller in pursuing the debt including legal costs on the solicitor and own client basis and the Seller's collection agency costs.
 - 14.3 Without prejudice to any other remedies the Seller may have, if at any time the Client is in breach of any obligation [including those relating to payment]; the Seller may suspend or terminate the supply of Goods to the Client and any of its other obligations under the terms and conditions. The Seller will not be liable to the Client for any loss or damage the Client suffers because the Seller has exercised its rights under this clause.
 - 14.4 If any account remains overdue after thirty [30] days then an amount of the greater of \$20.00 or 10.00% of the amount overdue shall be levied for administration fees which sum shall become immediately due and payable.
 - 14.5 Without prejudice to the Seller's other remedies at law the Seller shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to the Seller shall, whether or not due for payment, become immediately payable in the event that:
 - [a] any money payable to the Seller becomes overdue, or in the Seller's opinion the Client will be unable to meet its payment 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.
- 15. Security and Charge**
 - 15.1 Despite anything to the contrary contained herein or any other rights which the Seller may have whatsoever:
 - [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 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 these terms and conditions. The Client and/or the Guarantor acknowledge and agree that the Seller [or the Seller'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 Seller elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Client 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] the Client and/or the Guarantor [if any] agree to irrevocably nominate constitute and appoint the Seller or the Seller'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.
- 16. Cancellation**
 - 16.1 The Seller 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 Client. On giving such notice the Seller shall repay to the Client any sums paid in respect of the Price. The Seller shall not be liable for any loss or damage whatever arising from such cancellation.
 - 16.2 In the event that the Client cancels delivery of Goods the Client shall be liable for any loss incurred by the Seller [including, but not limited to, any loss of profits] up to the time of cancellation.
- 17. Privacy Act 1993**
 - 17.1 The Client and the Guarantor's [if separate to the Client] authorises the Seller to:
 - [a] collect, retain and use any information about the Client, for the purpose of assessing the Client's creditworthiness or marketing products and services to the Client; and
 - [b] disclose information about the Client, whether collected by the Seller from the Client 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 Client.
 - 17.2 Where the Client and/or Guarantors are an individual the authorities under 17.1 are authorities or consents for the purposes of the Privacy Act 1993.
 - 17.3 The Client and/or Guarantors shall have the right to request the Seller for a copy of the information about the Client and/or Guarantors retained by the Seller and the right to request the Seller to correct any incorrect information about the Client and/or Guarantors held by the Seller.
- 18. General**
 - 18.1 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.
 - 18.2 These terms and conditions and any contract to which they apply shall be governed by the laws of New Zealand and are subject to the jurisdiction of the courts of New Zealand.
 - 18.3 The Seller shall be under no liability whatever to the Client for any indirect loss and/or expense [including loss of profit] suffered by the Client arising out of a breach by the Seller of these terms and conditions.
 - 18.4 In the event of any breach of this contract by the Seller the remedies of the Client shall be limited to damages which under no circumstances shall exceed the Price of the Goods.
 - 18.5 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 Seller.
 - 18.6 The Seller may license or sub-contract all or any part of its rights and obligations without the Client's consent.
 - 18.7 The Seller reserves the right to 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 Seller notifies the Client of such change.
 - 18.8 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, drought, storm or other event beyond the reasonable control of either party.
 - 18.9 The failure by the Seller to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect the Seller's right to subsequently enforce that provision.