



TERMS OF TRADE FOR GOODS AND SERVICES

Release: 14-04-2016

*The following terms (**Terms**) apply to, are incorporated into and govern each and every contract between you the customer (**the Customer**) and Supreme Metal Component Solutions Limited (**the Company**) for the supply by the Company to the Customer of any goods (**Goods**) and/pr services (**Services**) at any time. These Terms may be varied by the Company at any time by posting the varied Terms on the Company's website at www.smcs.com which shall constitute sufficient notice to the Customer. If there is any inconsistency between these Terms and any provision of any Contract, Order, any trade terms of the Customer or any other agreement, document or communication, then, unless the Company has expressly agreed otherwise in writing, these Terms will always prevail.*

1. Quotations and Price

- 1.1 Where, prior to submitting an Order (as that term is defined in clause 1.2) to the Company, the Customer requests a quotation of the Company's proposed price of any specified Goods or Services, the Company will provide a schedule to the Customer setting out the Company's quoted Prices for such Goods and Services (**Quotation**). In order for any price set out in any Quotation to be valid and binding upon the Company, the Customer must submit to the Company a true copy of that Quotation signed by the Customer (**Accepted Quotation**), together with a valid Order based on that Accepted Quotation and submitted in accordance with clause 1.1, no later than the expiry date specified in that Accepted Quotation and, if no expiry date is specified, then within 60 days of the date of the original Quotation. A Quotation shall not itself give rise to a binding contract, and the Company may withdraw any Quotation before such time as the Customer has placed a valid Order and the Company has accepted such Order.
- 1.2 Orders for Goods or Services must be placed by the Customer by completing in full the form provided for that purpose by the Company (**Order**) and submitting it to the Company together with any necessary plans and specifications and, where a Quotation has been supplied by the Company in accordance with clause 1.1, the Accepted Quotation. The Company reserves the right to reject any Order in its sole discretion. Once accepted by the Company, an Order, these Terms, any Accepted Quotation and any written payment terms relating to that Order, together with the terms of any Credit Application shall form part of the contract between the Customer and the Company (**Contract**) and the Customer is bound to pay the full Price (as that term is defined in clause 1.4) for the relevant Goods and/or Services ordered by the Customer from the time that the Company accepts the relevant Order. A separate Contract shall be formed with respect to each accepted Order.
- 1.3 Once a binding Contract has been formed, it cannot be cancelled by the Customer without the express written consent of the Company, and upon any such

cancellation the Customer will be liable to pay the Company all costs and expenses incurred by the Company in fulfilling the relevant Order up to the date of cancellation.

- 1.4 The price payable by the Customer for any Goods or Services supplied by the Company pursuant to any Contract shall be the price:
- 1.4.1 set out in any applicable Accepted Quotation (**Quoted Price**); or
- 1.4.2 where no Quotation was supplied with respect to the relevant Order, the Company's standard price for the supply of those Goods or the hourly rate for the supply of those Services, as last notified to the Customer before the date of delivery of such Goods or performance of such Services (as the case may be),
- together with any additional amounts payable by the Customer in accordance with clauses 1.5 and 1.6 (**the Price**).
- 1.5 With respect to any Contract, in addition to the Price the Customer shall pay any goods and services tax or other sales tax chargeable on the relevant Goods or Services.
- 1.6 The Customer acknowledges and agrees that with respect to any Contract, prior to delivery, Prices for the Goods and Services to be supplied under that Contract:
- 1.6.1 are subject to change without notice where an Accepted Quotation does not form part of such Contract; and
- 1.6.2 may be adjusted, whether or not such Contract includes an Accepted Quotation, in accordance with actual circumstances becoming apparent to the Company in the fulfilment of such Contract and, in such circumstances the Customer shall pay, in addition to any Quoted Price:
- (a) all increases in cost to the Company in respect of labour, materials, necessary specification changes, transport, tax,

rates of exchange or otherwise relating to any relevant Goods or Services and arising after the date of the relevant Quotation or (if there is no Accepted Quotation) of the relevant Order and before the date of delivery;

- (b) the total cost incurred by the Company as a result of any variations or alterations to the relevant Goods or Services (as the case may be) requested by the Customer after the date of the relevant Quotation or (if there is no Accepted Quotation) of the relevant Order including without limitation the cost of additional drawings, samples, materials or tooling changes;
- (c) any costs incurred by the Company as a result of the method of payment used by the Customer, including, without limitation, any credit card transaction costs and all bank charges, including beneficiary bank charges;
- (d) any additional costs incurred in accordance with clause 5.1; and
- (e) all Goods and Services Tax or other value-added taxes payable in respect of the supply of the relevant Goods or Services.

1.7 Subject to clause 1.6, no variation to any terms specified in a Contract will be valid unless agreed to by both the Company and the Customer in writing.

2. Payment

2.1 The Customer agrees to pay the Price to the Company in consideration for the Company providing Goods and/or Services (as the case may be). The Customer must pay the Price in accordance with the relevant Contract provided that, unless otherwise expressly specified in the Contract, the Customer shall pay:

- 2.1.1 any deposit or any other amount that applies to the relevant Contract, before the Company will be obliged to commence work on the supply of Goods or Services;
- 2.1.2 in the case of Goods, the remainder of the Price upon delivery of the relevant Goods; or
- 2.1.3 in the case of Services, the remainder of the Price upon receipt by the Customer of the relevant invoice; or
- 2.1.4 where the Company has agreed to provide credit to the Customer, the remainder of the Price as agreed in writing between the Company and the Customer.

2.2 The payment of any agreed instalment, or the final payment, of the Price by the Customer is to be made in full without deduction or setoff according to the relevant Contract and any payment by the Customer through any form of payment other than cash shall not be deemed to be complete until that form of payment has been honoured.

2.3 If the Customer is a company or business existing outside of New Zealand, then the Price shall be the Price

payable applicable at the date of Delivery (as that term is defined in clause 5.1) under the relevant Contract subject to any increases in accordance with clause 1.4; and, subject to any variation of this clause (which will be notified to the Customer in writing), the Price shall be paid by the Customer to the Company as follows:

- 2.3.1 in cleared funds prior to shipment of the Goods by the Company to the Customer (such as credit card payment);
 - 2.3.2 by an irrevocable letter of credit provided by a reputable overseas bank acceptable to the Company in its sole discretion; or
 - 2.3.3 by any other means specified in the relevant Contract, or otherwise agreed in writing by the Company and notified to the Customer.
- 2.4 Unless otherwise agreed in writing, the due date for payment shall be the 20th of the month following invoice. If the Customer fails to complete payment of the Price for any Goods or Services in full by the due date the Company may, at its sole discretion (and without affecting any other rights the Company may have against the Customer):
- 2.4.1 cancel or suspend any Contract, and may claim for any loss occasioned thereby; and
 - 2.4.2 require the Customer to pay, on demand, default interest on any amount outstanding at the Company's commercial banker's overdraft facility rate plus 5% per annum accruing on a daily basis on the unpaid portion of the Price from the due date until the date when payment to the Company is actually made; and
 - 2.4.3 require the Customer to pay all expenses and costs (including legal costs as between solicitor and client) in connection with the Company recovering or attempting to recover any overdue amount.

2.5 Where the Company considers that the financial condition of the Customer so warrants it may decline to deliver any Goods or carry out Services and/or suspend performance of any of its obligations under any relevant Contract unless the Customer provides security for payment of the Price that is acceptable to the Company in the Company's sole discretion.

2.6 The Company reserves the right to close, or amend the terms of, any monthly account of the Customer at any time established pursuant to a Credit Application Form.

3. Tools and Dies (Price, Risk and Customer Inspection)

- 3.1 The Customer may:
- 3.1.1 request tools or dies to be supplied by the Company pursuant to a Contract; or
 - 3.1.2 provide tools and dies for the Company to use in accordance with the manufacture and supply of Goods,

and in either situation, where tools and dies are damaged or deteriorate for any reason the Customer shall accept charges for such repair or replacement of those tools and dies. The Company does not insure Customer tools or dies and all such insurance is the responsibility of the Customer.

3.2 The Customer agrees that where it has provided tools or dies to the Company:

3.2.1 the Company shall be entitled to hold a lien over those tools or dies as security for payment of any moneys outstanding to the Company:

3.2.2 if the Customer resides in New Zealand, then:

(a) those tools or dies shall be subject to a continuing security interest in favour of the Company for the performance of the Customer's obligation to make payment to the Company of all monies owing by the Customer to the Company for any reason from time to time (**Security Interest**); and

(b) the Customer acknowledges that the Company may, at the Company's cost, register its Security Interest in those tools or dies, and all of the Customer's present and future rights in relation to those tools and dies, on the Personal Properties Securities Register (**PPSR**) established under the Personal Property Securities Act 1999 (**PPSA**) in accordance with clause 7, as security for the Company against any indebtedness of the Customer to the Company,

and the provisions of clause 7 shall apply to such Security Interest.

4. Specifications and Goods Quantity Variations

4.1 The Company shall be entitled to rely on the accuracy of any plans, specifications and other information provided by the Customer as well as any tools or dies supplied by the Customer in connection with any Contract.

4.2 Where the Company gives a description to the Customer of any Goods which are the subject of a Contract, whether relating to drawings, metallurgical standards, chemical, mechanical or other properties and any other descriptive matter, such description shall be given by way of identification only and shall not form part of any Contract.

4.3 The Customer acknowledges and agrees that, with respect to any particular Contract:

4.3.1 due to variations in the manufacturing process the actual quantity of Goods manufactured may differ from the quantity specified in that Contract;

4.3.2 the Customer will accept and pay for all quantities of Goods delivered and invoiced up to 10% more or less than the quantity specified in that Contract;

4.3.3 where the quantity of Goods delivered is 10% more than the quantity ordered, the customer may refuse to accept delivery of the quantity in excess of the 10% but all quantities accepted are to be paid in full, and;

4.3.4 where the quantity of Goods delivered is lower than the quantity ordered less 10%, the Customer agrees to accept the lower quantity unless a minimum quantity is stipulated in the Contract (whether in the Order or otherwise) as being a specific requirement. The Customer

shall only be required to pay for the quantity of Goods actually delivered.

4.3.5 The Company reserves the right to deliver the Goods by instalments and each instalment shall be deemed to be a separate contract under the same provisions as the main Contract. Should the Company fail to deliver or make defective delivery of one or more instalments this shall not entitle the Customer to cancel the separate contract for that particular instalment (if applicable), or the Contract for all the Goods or any other contract.

5. Delivery of Goods and Services

5.1 Delivery of Goods will be Ex-Works, as that term is defined in the 2010 revision of the International Chamber of Commerce's official rules for the interpretation of trade terms, so that delivery of Goods is deemed to occur when the Company places the Goods at the disposal of the Customer, or makes them available for collection by the Customer or a carrier engaged to physically deliver the Goods to the Customer, at the Company's designated premises (**Delivery**).

5.2 If provided for in a Contract, the Company will deliver or arrange for the physical delivery of any Goods ordered by the Customer to the address specified in such Contract or to such other address as is subsequently agreed in writing between the Company and the Customer (**Customer's Nominated Address**). Unless otherwise agreed in writing, the Customer will pay all costs related to the delivery of the Goods.

5.3 The Customer must notify the Company (and the Company's nominated carrier) with 24 hours if, upon physical receipt of any Goods pursuant to any Contract, any Goods specified in that Contract are missing or damaged.

5.4 Any times for Delivery (or physical delivery) notified by the Company to the Customer in any Contract or otherwise are estimates only. The Company is not liable for any loss or damage arising in any way from delay in Delivery (or physical delivery) and a delay in Delivery (or physical delivery) will not entitle the Customer to cancel any Contract. The Company reserves the right to cancel delivery of any Goods or such instalments thereof without prejudice to its rights to recover all sums owing to it in respect of deliveries already made.

5.5 Where the Company has performed part or all of the supply of Goods or Services at a time agreed by the Customer but where Delivery is delayed because of any act, omission or delay by the Customer or where the Company is unable to perform the Services or is delayed from performing the Services due to failure by the Customer to render its site safe under any health and safety regulations, the Company will require the Customer to pay that portion of the Price which represents the costs incurred by the Company in carrying out supply and the Company may also charge stand-by costs while the Customer renders its site safe.

6. Risk, Ownership and Title

6.1 Risk in the Goods shall pass to the Customer immediately upon Delivery but legal and beneficial ownership and title in the Goods shall remain with the Company until payment of the Price has been received by the Company from the Customer in full.

6.2 The Customer agrees to insure the Goods from the point of Delivery and will not hold the Company liable for any loss or damage that may occur to Goods while they are at the risk of the Customer. If the Price of such Goods has not been paid in full to the Company then if any or part of the Goods suffer loss or damage while under the risk of the Customer, then:

6.2.1 the Customer shall remit the proceeds of insurance claims to the Company to the extent necessary to complete payment of the balance of the Price of all other amounts owing by the Customer to the Company; or

6.2.2 if the Customer does not insure the Goods from the point of Delivery sufficiently to enable it to comply with its obligations under clause 6.2.1, then the Customer agrees to immediately pay the Company the balance of the Price and any other monies owing by the Customer to the Company for such Goods.

6.3 If the Customer sells any Goods before the Price of such Goods has been paid in full to the Company, the Customer shall immediately apply the proceeds of such sale or sales towards completing payment of the Price and any other amounts owing by the Customer to the Company.

7. Security Interest

7.1 This clause 7 only applies to Customers based in New Zealand.

7.2 The Goods and any proceeds derived by the Customer from those Goods, and all of the Customer's present and future rights in relation to the Goods and any such proceeds, are subject to a Security Interest in favour of the Company.

7.3 The Customer acknowledges that the Company may, at the Company's cost, register its Security Interest in the Goods, and all of the Customer's present and future rights in relation to the Goods, on the PPSR.

7.4 The Customer shall do all things and provide all information as the Company may require for the purpose of securing to the Company the Goods and the performance of all of the Customer's obligations under these Terms, and for the purpose of ensuring that the Company has a perfected first ranking Security Interest in the Goods and any proceeds.

7.5 The Customer shall not change its name, address or contact details without first notifying the Company in writing at least 14 days before such change takes effect.

7.6 The Customer shall notify the Company as soon as possible of any proposed or actual change in control of the Customer, or sale of the Customer's business or a significant part thereof.

7.7 The Customer:

7.7.1 agrees that nothing in sections 114(1)(a) (to receive notice of sale or goods), 116 (to receive a statement of account), 120(2) (to receive notice of proposal to take goods), 133 (to reinstate security agreement) and 134 (limit on reinstatement) of the PPSA will apply to these Terms or the Security Interest under these Terms;

7.7.2 waives all of the Customer's rights under sections 121 (to object to proposal), 125 (damage to goods on removing accession), 129 (notice of removal of accession) and 131 (court order preventing removal of accession); and

7.7.3 waives the Customer's right to receive a copy of the verification statement confirming registration of a financing statement or financing change statement relating to the Security Interest under these Terms.

7.8 The terms **accession, financing statement, personal property, verification statement** and **security interest** have the meanings given to them under the PPSA.

7.9 The Customer will:

7.9.1 maintain and keep the Goods in good working order and condition and protected against theft, loss or damage; and

7.9.2 permit the Company at all reasonable times by its agents, employees and officers to enter upon any land or premises owned or occupied by the Customer to view and inspect the Goods.

7.10 The Customer will not:

7.10.1 permit to subsist any other security interest in relation to the Goods; or

7.10.2 except in the normal course of business, sell, lease or dispose of, or permit the sale, lease or disposal of, the Goods.

7.11 The Company's interest in the Goods continues if the Goods are processed, included or dealt with in any way causing them to become accessions, processed or commingled goods (as defined in the PPSA). The security interest in the original Goods will continue in the whole in which they are included and the Customer agrees that it will not grant to any other person a security interest in either the Goods or in the whole.

8. Retention of Title of Goods Supplied to International Customers

8.1 This clause 8 only applies in respect of Goods supplied to a Customer based outside of New Zealand.

8.2 Property in the Goods is retained by the Company until all monies owing by the Customer to the Company for any reason from time to time have been paid in full (**Payment Date**).

8.3 Subject to clause 8.4, the Customer must, until the Payment Date, hold the Goods as bailee for and on behalf of the Company and must store the Goods in a manner that enables them to be identified as the Company's property.

8.4 The Customer may sell the Goods before the Payment Date if the sale is genuine and in the ordinary course of its business. This authority may be revoked by the Company without the need for any notice if the Company deems the credit of the Customer to be unsatisfactory or an event as specified in clause 8.6 occurs in respect of the Customer.

8.5 Where Goods are sold by the Customer under the authority granted in clause 8.4, then as a result of the Customer holding those Goods as fiduciary agent and bailee of the Company, any book debt created on the

sale of the Goods and the proceeds of sale when received by the Customer shall be held on trust for the Company by the Customer. Such proceeds shall be placed in a separate bank account and first, applied towards the satisfaction of all indebtedness of the Customer to the Company under these Terms and secondly, be retained by the Customer.

8.6 If the Customer:

- 8.6.1 defaults in the due payment of any moneys payable to the Company, whether under these Terms or otherwise;
- 8.6.2 enters into any composition, arrangement or compromise with the Customer's creditors; or
- 8.6.3 does any act which would render the Customer liable to be put into liquidation or if a resolution is passed or a petition is filed for the Customer's liquidation or a receiver is appointed over all or any of the Customer's assets,

the Company may, without prejudice to any other right the Company has at law or in equity, at the Company's option, retake possession of any Goods that have not been sold by the Customer and resell the same to recover any amounts outstanding to the Company, and the Customer irrevocably authorises the Company, as the Customer's agent, to enter into the premises where such Goods are stored and remove the Goods for that purpose without being responsible for any damage reasonably caused in doing so. The Customer shall indemnify the Company for all such money and all costs, charges, expenses and all claims and losses suffered by the Company in exercising its rights under this clause 8.6.

9. **Warranty and Guarantees**

9.1 The Company shall warrant, for a period of twelve months with respect to Goods and for a period of three months with respect to workmanship performed by the Company, that:

- 9.1.1 all Goods sold to, and Services performed for, the Customer pursuant to a Contract will comply in all material respects with any relevant specifications, instructions notified by the Customer, and accepted and agreed to by the Company, in writing;
- 9.1.2 all Goods sold to the Customer pursuant to a Contract will be free from faulty material or workmanship according to such Goods' properties and general specifications defined in the Accepted Quotation (if any).

Except as provided in this clause 9.1, the Company gives no warranty or undertaking and makes no representation regarding the Goods or the Services, and all other warranties are expressly excluded to the greatest extent permitted by law.

9.2 The Company warrants that, where an Accepted Quotation forms part of a Contract, Goods supplied in relation to that Accepted Quotation:

- 9.2.1 will operate according to the general specifications described in that Accepted Quotation,

9.2.2 will have been tested according to any testing procedure that is described in that Accepted Quotation,

9.3 For the purposes of this clause 9:

9.3.1 **Goods** shall mean finished Goods, or any materials used in the manufacture of Goods, including (without limitation):

- (a) parts, equipment, components, steel castings or fittings manufactured by the Company or any contractor of the Company;
- (b) tools or dies manufactured by the Company or any contractor of the Company.

9.3.2 **Services** shall mean workmanship, servicing or repair of the Customers' property.

9.4 The parties agree that no warranty is given, and all warranties and liabilities of the Company are excluded to the greatest extent permitted by law, in respect of:

- 9.4.1 any defect or failure of any Goods or Services that arises due in any way to any aspect of designs, drawings or instructions supplied by the Customer;
- 9.4.2 any defect or failure of any Goods or Services that arises due to defective tools, dies or other materials supplied by the Customer for use by the Company in the manufacture of such Goods or the performance of such Services;
- 9.4.3 any defect or failure of any Goods or Services that arises as a result of acts, defaults or omissions outside the control of the Company;
- 9.4.4 any Goods that, since the date of delivery, have been altered or modified from the condition in which they were supplied by the Company in any manner;
- 9.4.5 any matter arising during any period in which the Price for the relevant Goods or Services has not been paid in full and in strict accordance with the Contract, or the Customer is in default in relation to any other outstanding indebtedness to the Company; or
- 9.4.6 any parts or components of Goods that are not actually manufactured by the Company;
- 9.4.7 any Goods that are used or operated by persons not technically competent to do so;
- 9.4.8 any Goods, the installation or maintenance of which has been recommended by the Company to be carried out by a Registered Engineer or Registered Electrician, where such recommendation has not been followed;
- 9.4.9 any Goods that have been subject to accident or careless operation by the Customer or any other person;
- 9.4.10 any Goods that have been subject to normal metal corrosion, deterioration caused by electrolysis or normal wear and tear;

- 9.4.11 any Goods that are used, operated, cared for, serviced or maintained otherwise than in strict accordance with the Company's instructions or otherwise improperly;
- 9.4.12 any Goods that have been used for any purpose for which they were not designed;
- 9.4.13 any Goods that have been used in a manner which is inconsistent with any specifications or ratings contained in the relevant Contract or supplied with such Goods;
- 9.4.14 the fitness of the Goods for any intended purpose not fully described, with all relevant technical information, in the relevant Accepted Quotation;
- 9.4.15 any Goods that are mixed with, or used in conjunction with, other goods or materials not expressly approved by the Company in writing;
- 9.4.16 any Goods that have undergone any commissioning, testing or acceptance procedure specified in the relevant Accepted Quotation (if applicable), with results that are satisfactory to the Company at its discretion;
- 9.4.17 any defect or failure of any Goods in respect of which the Customer has rejected a recommendation by the Company that testing of a particular type or extent be carried out on such Goods prior to Delivery, where it is reasonably likely that such defect or failure, or the cause of such defect or failure, would have been identified by such recommended testing if carried out; or
- 9.4.18 any matter arising, or any claim brought, outside of the applicable period specified in clause 9.1.

10. Defects

- 10.1 The Customer shall give the Company written notice of any defect in material and/or workmanship of any Goods or Services within 30 days from the date of Delivery (in the case of Goods) or performance (in the case of Services) and, in the absence of any such notice, shall be deemed to have accepted such Goods or Services as being free of defects. Where such notice relates to defective Goods, such Goods must be delivered to the Company at the Customer's expense together with such notice.
- 10.2 Subject to clause 10.3, where the Customer notifies the Company as to a defect in Goods or Services in accordance with clause 10.1 the Company shall, in its sole discretion and within 30 days of receipt of such notice, either:
 - 10.2.1 issue a credit note to the Customer in an amount equal to the Price of the defective Goods or Services;
 - 10.2.2 in the case of Goods, repair or replace the defective Goods in question at its own cost and expense; or
 - 10.2.3 in the case of Goods, where the Company finds in its sole discretion that such Goods are not defective, the Company shall return such Goods to the Customer at the Customer's cost.

- 10.3 Notwithstanding the provisions of clauses 10.1 and 10.2, the Company will not be obliged to consider or accept any claim by the Customer where any of the circumstances contemplated in clause 9.4 apply.

11. Limitation of Liability

- 11.1 The Company shall not be liable for any loss or damages of any kind whatsoever, including (without limitation) any loss of profits or any consequential, indirect or special loss, damage or injury of any kind howsoever suffered by the Customer or any other person arising directly or indirectly from any breach of any of the Company's obligations arising under or in connection with any Contract including delays in the delivery of Goods or Services or from the use of damaged or defective Goods or from any cancellation of any Contract or from any negligence, misrepresentation or other act or omission on the part of the Company, its servants, agents or contractors.
- 11.2 The Customer shall at all times indemnify and hold harmless and defend the Company and its employees, officers, agents and contractors against any claims by third parties and against any loss, costs, claims, damages, expenses (including legal costs and expenses on a solicitor/own client basis), liabilities, proceedings or demands, whether direct or indirect, incurred or suffered by any of them where caused by:
 - 11.2.1 a breach of these Terms, or any term of any Contract, or any warranty given by the Customer in relation to the Goods, on the Customer's part or on the part of any person for whom the Customer is responsible; or
 - 11.2.2 any wilful, negligent or unlawful act or omission of the Customer.
- 11.3 Notwithstanding anything contained in this clause 11 or contained elsewhere in these Terms, the Company's maximum liability to the Customer shall be limited as follows:
 - 11.3.1 Where the Company becomes unable to supply Goods in respect of which a portion of the Price has already been paid to the Company, the Company's maximum liability is limited to that portion of the Price of those Goods that the Customer has already paid to the Company.
 - 11.3.2 For any breach of the warranty set out in clause 9, the Company's maximum liability is limited, at the option of the Company, to the replacement of any such defective or non-complying Goods or payment of direct costs and losses of the Customer not exceeding the invoice price of the relevant Goods.
- 11.4 Except as provided in this clause 11, the Company will not be liable to the Customer under these Terms, or in tort (including negligence) or otherwise.
- 11.5 The Customer will not make any representation or give any guarantee, warranty or other undertaking in relation to the Goods unless the Company supplies that representation, guarantee, warranty or undertaking to the Customer in writing, and authorises the Customer in writing to make such representation, or give such guarantee, warranty or undertaking, to third parties. Without any limitation to the generality of the forgoing the Customer shall not do any act or make any omission

which gives rise or might give rise to any liability on the part of the Customer and/or the Company under the Consumer Guarantees Act 1993 (**CGA**) or the Fair Trading Act 1985. The Customer shall indemnify the Company in respect of any liability (including any costs and expenses) incurred as a result of the Customer's breach of this clause **11**.

11.6 The Customer agrees that the supply of Goods by the Company to the Customer under these Terms or otherwise is for business purposes and the provisions of the CGA will not apply to these Terms.

11.7 If:

11.7.1 any condition or warranty is implied into these Terms under any trade practices, sale of goods, fair trading or other applicable legislation and cannot be excluded; or

11.7.2 notwithstanding the other provisions of this clause **11**, the Company has any liability to the Customer,

then to the fullest extent permitted by law the liability of the Company for claims by the Customer for breach of the condition or warranty so implied or otherwise will be limited at the option of the Company to replacement of such defective or non-compliant Goods or payment of direct costs and losses not exceeding the invoice value of such defective or non-complying Goods.

12. Exclusion of Liability - Subsequent Loss

12.1 Where the Company manufactures Goods based on drawings, designs or specifications supplied by the Customer or uses tools and dies supplied by the Customer, or where the Company undertakes installation or assembly of Goods for the Customer, then subject to any warranty given in writing to the Customer by the Company pursuant to clause **9**, the Company shall not be liable for any loss, damage (including spoilage), injury or consequential loss either directly or indirectly caused by a failure of the Goods or defect in installation or assembly. The Customer shall make no claim against the Company and will indemnify save harmless and defend the Company against any claims by third parties for any such loss, damage (including spoilage), injury or consequential loss.

13. Default, Termination and Suspension

13.1 The Company may suspend or terminate immediately, without incurring any liability, any Contract, and the payment of all amounts owing by the Customer to the Company under these Terms shall immediately become due and payable, if the Customer:

13.1.1 is in breach of any term of these Terms or any Contract with the Company;

13.1.2 is unable to pay its debts as they fall due (or is deemed to be unable to pay its debts under the Companies Act 1993) or ceases or threatens to cease conducting its business in the normal manner;

13.1.3 enters into, or attempts to enter into, any composition, assignment or other arrangement with, or for the benefit of, its creditors;

13.1.4 becomes, threatens or resolves to become, or is in jeopardy of becoming insolvent;

13.1.5 being a partnership, dissolves, threatens or resolves to dissolve or is in jeopardy of dissolving; or

13.1.6 being a natural person, dies or becomes bankrupt.

13.2 Termination of any Contract shall not relieve the Customer of its obligations to pay all money owing by it to the Company on any account whatsoever, which money shall be payable immediately notwithstanding that due date for payment may not have arrived and any Terms able to survive termination shall continue to apply. Termination of any Contract shall not relieve the Customer from liability arising from any antecedent breach of the terms of that Contract.

14. Use of Intellectual Property and Indemnity

14.1 The Company acknowledges that neither the Company, nor anyone it is responsible for has, nor will acquire, any right (except as expressly provided in this clause **14.1**), title or interest in the Customer's pre-existing intellectual property, including all intellectual property supplied by the Customer to the Company by way of designs, instructions, plans, drawings and specifications for the Goods (**Customer IP**), and no Contract shall transfer any title or ownership in any of the same to the Company. The Customer provides the Company, and its employees, contractors and agents, with an unlimited irrevocable licence to use the Customer IP for the purposes of the provision of Goods and Services by the Company to the Customer pursuant to a Contract.

14.2 The Customer acknowledges that neither the Customer nor anyone it is responsible for has, nor will acquire, any right (except as expressly provided in this clause **14.2**), title or interest in the Company's intellectual property (including published material, patents, trademarks, copyrights, manuals, drawings and other technical information (other than the Customer IP), any intellectual property in any Goods or Services and any other type of intellectual property whatsoever) (**Company IP**), and no Contract shall transfer any title or ownership in any of the same to the Customer. The Customer agrees that the Company IP shall be used for the sole purposes of the Customer in using the Goods and may not be copied, altered, adapted or given to any third party without the written permission of the Company.

14.3 The Customer warrants that it will take steps to ensure that any Customer IP supplied to the Company (being oral or written) will, if used, not cause the Company to infringe the patent, registered design, trademark or copyright of any person and the Customer shall indemnify the Company against damages, costs and expenses in respect of which the Company may become liable by using such Customer IP and including those arising from the infringement of patents, copyrights or trademarks by the Customer.

15. Confidentiality

15.1 For the purpose of the Terms, "Confidential Information" means (as applicable):

15.1.1 any confidential information of the Company, including, without limitation, the Company IP;

15.1.2 any confidential information of the Customer, including, without limitation, the Customer IP,

whether communicated orally, visually, in writing, electronically or in any other form, other than information which:

15.1.3 is required to be disclosed by law; or

15.1.4 is public information other than as a result of disclosure by the receiving party.

15.2 Neither party shall, at any time during a Contract, or any time thereafter (including after termination of a Contract) except as expressly provided in these Terms or as otherwise expressly agreed by the parties in writing, disclose to any person or copy or make use of in any manner any Confidential Information it has received from the other party pursuant to a Contract.

15.3 Each party shall indemnify the other party against any loss, claims, damages, expenses, liabilities, costs (including solicitor – client costs), proceedings or demands arising from any breach of its obligations pursuant to clause 15.2.

16. Applicable Law for Dispute and Arbitration

16.1 All Contracts shall be governed by the laws of New Zealand whose Courts shall have exclusive jurisdiction to hear and determine any dispute in relation to a Contract.

17. Terms of Contract between Company and Customer

17.1 If there is any inconsistency between these Terms and any Contract, Order, trade terms of the Customer or any other agreement, document or communication whatsoever, then, unless the Company has expressly agreed otherwise in writing, these Terms will always prevail.

17.2 The only terms and conditions, which will be binding on the Company are the terms forming part of each Contract as set out in clause 1.2, and those terms imposed by law without right of exclusion.

18. Force Majeure

18.1 The Company shall not be liable for failure or delay to perform any obligation in whole or in part under these Terms or for any loss or damage (including indirect or consequential loss or damage) if such delay is due to Force Majeure, provided that nothing in this clause 18 shall excuse payment of any amount owing as it becomes due under any Contract. The occurrence of such an event shall not give the Customer a right of cancellation of any contract.

18.2 For the purposes of these Terms, *Force Majeure* means a circumstance beyond the reasonable control of a party which results in that party being unable to observe or perform on time an obligation under these Terms including, without limitation, strikes, acts of war, terrorism, riots, civil commotion, malicious damage, sabotage, governmental regulations or directions, revolution, acts of God, lightning strikes, earthquakes, floods, storms, explosions, fires and any natural disaster, governmental regulations or directions

19. Privacy

19.1 In compliance with the Privacy Act 1993, the Customer authorises the Company to obtain information about the Customer from the Customer or any third party in the

course of, but not limited to, the Company's credit enquiries.

19.2 The Customer further authorises the Company to furnish to any third party any information held by the Company about the Customer relating to the Customer's credit worthiness, the details of any credit application made by the Customer to the Company and the details of any subsequent dealings that the Customer may have with the Company as a result of any credit application being actioned by the Company, and the Company may give any such information to any other person for credit assessment and debt collection purposes.

19.3 The Customer agrees that any other information collected by the Company about the Customer is accessed or collected for the use of the Company or related company in the course of its business, including direct marketing activities.

19.4 The Customer (if an individual) shall be entitled to access and request the correction of any of his or her information held by the Company.

20. No Representations

20.1 The Customer warrants that it has or will have used its own skill and judgement in deciding to enter into any Contract, and that the Customer has not relied on any representation made by the Company or its servants or agents which has not been stated expressly in these Terms, or upon any descriptions, illustrations or specifications contained in any document (including catalogues or publicity material produced by the Company).

21. Local Laws

21.1 It shall be entirely the responsibility of the Customer to ensure that the Goods and the use thereof comply with the laws, regulations and codes of any particular country or local authority and with the requirements of the Customer.

22. Assignment

22.1 The Customer may not assign all or any of its rights or obligations under any Contract without the prior written consent of the Company.

22.2 The Company may assign any Contract or any of its rights, duties or obligations under any Contract at any time.

23. Waiver

23.1 All waivers shall be effective only in writing by the Company. No failure to exercise and no delay in exercising any right under any Contract shall operate as a waiver of that right nor shall any single or partial exercise of any right preclude any further or other exercise of that right or any other right.

24. Invalid Provision

24.1 If any provision of these Terms is declared or adjudged to be invalid, void or unenforceable, such provision shall be severable, shall be deemed to be deleted from these Terms and shall not affect the validity, existence, legality or enforceability of the remaining provisions.

25. Entire Agreement

25.1 The provisions of each Contract (as that term is defined in clause 1.2) constitute the entire agreement between the parties with respect to the subject matter of that Contract, and supersede all previous understandings, arrangements, agreements and communications, whether verbal or written, between the parties or their advisers with respect to that subject matter. Any verbal agreement which does not conform with these Terms shall not be binding on the Company unless it has been confirmed by the Company in writing.

26. Guarantee

26.1 Where the Customer is a company the Customer shall procure that an individual, who is acceptable to the Company in the Company's sole discretion, provides a personal guarantee of the Customer's obligations to the Company on the same terms as are set out in the section entitled *Personal Guarantee* in the Company's Credit Application form from time to time.

ACCEPTANCE

For and on behalf of the Customer:

Signature: _____

Name: _____

Title/Position: _____

For and on behalf of the Customer's Guarantor:

Signature: _____

Name: _____

Title/Position: _____