

KPH TRANSPORT LIMITED - TERMS AND CONDITIONS OF CARRIAGE (TERMS)

These Terms (as amended from time to time by publication on KPHT's website (<http://www.nzhothouse.co.nz>) shall be incorporated into each Contract between the Customer and KPHT for the provision of Services by KPHT to the Customer.

1. Definitions and Interpretation

1.1 **Definitions:** In these Terms, unless the context requires otherwise, the terms below have the following meaning:

Account Application Form	the form that the Customer is required to complete and submit to KPHT to become an authorised account holder with KPHT.
Act	the Carriage of Goods Act 1979 as amended from time to time.
Business Day	any day other than a Saturday, Sunday or a statutory public holiday in New Zealand.
Consignment Note	a Customer's order for the Services.
Contract	each contract entered into between KPHT and a Customer comprising the Account Application Form, these Terms, the Consignment Note, and any variation or amendment made to those documents by KPHT.
Customer	the person, firm or company specified as the Customer on the Account Application Form or where no Account Application Form has been completed, the Customer is the person referred to in the Consignment Note.
Default Rate	KPHT's commercial banker's overdraft facility rate plus 3% per annum.
FAF	a percentage being a fuel adjustment factor set by KPHT from time to time to take into account increased fuel costs.
Force Majeure	a circumstance beyond the reasonable control of KPHT which results in it being unable to observe or perform on time an obligation under any Contract including, without limitation, delays due to breakdown or adverse weather, embargoes, strikes or other industrial action, acts of war, terrorism, riots, civil commotion, malicious damage, sabotage, revolution, acts of God, lightning strikes, earthquakes, floods, storms, explosions, fires and any natural disaster.

Goods	the goods that the Customer requests KPHT to deliver.
GST	goods and services tax pursuant to the Goods and Services Tax Act 1985.
KPHT	KPH Transport Limited and any person authorised by it to act on its behalf and any of its related companies as defined in section 2(3) of the Companies Act 1993.
Services	the transportation and delivery services in and around New Zealand.
Service Charges	KPHT's standard charges, applicable prices, fees, levies, FAFs and taxes for the Services, as notified on KPHT's website from time to time.
Surcharges	Surcharges may be from time to time added for various extraordinary or unforeseen circumstances.

2. Acceptance of Order

- 2.1 **Account Application Form:** KPHT shall not be obliged to fulfil a Consignment Note unless the Customer has completed an Account Application Form which has been accepted by KPHT in its sole discretion.
- 2.2 **Consignment Note:** Orders for Services must be placed on a Consignment Note complying with clause 5. A Consignment Note is subject to acceptance by KPHT and KPHT reserves the right to reject any Consignment Note in its sole discretion.
- 2.3 **Acceptance of Agreement:** The execution of the Consignment Note by the Customer shall be deemed to be acceptance of the Contract by the Customer from the time when the execution took place. The Customer acknowledges and agrees that each accepted Consignment Note shall constitute a separate Contract.

3. Charges

- 3.1 **Quotation:** KPHT may, at the Customer's request, give a written quotation to the Customer for the Services. Where KPHT elects to give a quotation this will be a quotation only and it does not give rise to a binding contract until the Customer completes a Consignment Note which is subsequently accepted by KPHT within any deadline set out in the quotation.
- 3.2 **Payment:** The Customer shall pay the Service Charges to KPHT in consideration for KPHT providing the Services.
- 3.3 **Invoicing:** KPHT shall invoice the Customer for the Services and the Customer shall pay the invoice on or by the 20th of the month following the date of the relevant invoice. The Customer shall not be entitled to withhold payment or make any set-off or deduction from any payment due by the Customer to KPHT under any Contract in any circumstance.
- 3.4 **Overdue amount:** If any payment is not made to KPHT by the Customer by the date due for payment, KPHT may, at its sole discretion (and without affecting any other rights that KPHT may have against the Customer), require the Customer to pay, on demand, default interest at the Default Rate on any amount outstanding, accruing on a daily basis on the unpaid portion of the price from the date due for payment until the date when payment is

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actually made. The Customer will be liable to pay all expenses and costs (including legal costs as between solicitor and client) in connection with KPHT recovering or attempting to recover any overdue amount under any Contract.

3.5 **Review:** KPHT shall be entitled to review and alter the Service Charges including the FAF by one month's notice to the Customer on its website ***[Is this amendment of 1 month sufficient?]***

3.6 **Invoice disputes:** The parties shall use their reasonable endeavours to resolve any disputes as to invoices as soon as possible. Following resolution of any such dispute, the Customer shall pay any amounts which the parties agree should be paid within five Business Days together with interest on that sum in accordance with clause **3.4** unless waived by KPHT.

3.7 **Set-off:** The Customer authorises KPHT to set-off, withhold or deduct without prior notice or demand any amount due or payable to KPHT by the Customer under any Contract from any payment made by KPHT to the Customer in full or partial satisfaction of any amount owing to the Customer by KPHT under any Contract.

4. Delivery

4.1 **Acceptance of Goods for Delivery:** Subject to these Terms, Goods are accepted for carriage by KPHT at the time KPHT collects those Goods for delivery. KPHT shall have no liability whatsoever in respect of those Goods prior to that time.

4.2 **Delivery:** The Goods shall be deemed to have been delivered by KPHT when they are physically deposited at the address given to KPHT by the Customer or consignee for that purpose.

5. Customer Obligations

5.1 **Packing and Labelling:** The Customer warrants that all Goods:

5.1.1 have been labelled correctly and that the contents of packages are adequately and securely packed, wrapped and cushioned for transportation;

5.1.2 if any of them are noxious, dangerous, hazardous, inflammable or capable of causing damage or injury, then they have been declared on the Consignment Note; and completed DG documentation, is attached.

5.1.3 are fit to be carried and stored in accordance with the Consignment Note in the condition and packed in the manner in which they are tendered for carriage; and

5.1.4 are fully, exactly and correctly described on the Consignment Note and in particular (if the Customer has not previously advised KPHT in writing), that on the Consignment Note:

(a) the accurate weight declaration has been made;

(b) if applicable, a choice of Owner's Risk liability has been made as per clause **10.1**; and

(c) the required temperature setting for each load of Goods has been included.

- 5.2 **Consumer Guarantees Act 1993 (CGA) and Fair Trading Act 1986 (FTA):** The Customer acknowledges that it is acquiring the Services for business purposes and that the provisions of the CGA are excluded. The Customer will not do or omit to do anything which gives rise to any liability on the Customer's part or on the part of KPHT under the CGA or the FTA. The Customer will not make any representation or give any guarantee, warranty or other undertaking in relation to the Services unless that representation, guarantee, warranty or undertaking is supplied by KPHT.

6. **KPHT's Obligations**

- 6.1 **Compliance with law and policies:** KPHT ensure that at all times that it holds all authorisations, permits and licences required to perform the Services in accordance with the Terms.
- 6.2 **Subcontractor:** KPHT may subcontract the performance of the Services to its agents and subcontractors.

7. **Damage, Deterioration And Returns**

- 7.1 **Procedure:** KPHT shall provide the Customer with details of any damage or deterioration to or loss of any of the Goods while such Goods are being or are otherwise in the possession of KPHT and if required by the Customer, promptly return to the Customer any Goods that are so damaged or deteriorated, at the Customer's cost.
- 7.2 **Claims:** The parties shall use their reasonable endeavours to ensure that any claim in relation to damaged or deteriorated Goods is investigated and resolved within a reasonable time of it being notified to the Customer.

8. **Lien**

- 8.1 **Lien:** As from the time when any amount payable to KPHT under the any Contract (**Outstanding Amount**) becomes due, KPHT shall be entitled to an active and particular lien over the Goods. If payment in full for the Outstanding Amount has not been paid to KPHT within the time period specified in clause **3.3**, KPHT shall be entitled to remove the Goods to any suitable premises for storage.
- 8.2 **Sale:** If payment in full for the Outstanding Amount has not been tendered to KPHT within one month of the time period specified in clause **3.3**, KPHT shall be entitled to sell the Goods by public auction. From the proceeds of such sale, KPHT shall be entitled to deduct:
- 8.2.1 the balance of the Outstanding Amount; and
 - 8.2.2 all expenses reasonably incurred by it in removing and storing the Goods pursuant to clause **8.1**, and in arranging and conducting the sale of the Goods.
- 8.3 **Sale Surplus:** Where the amount of the proceeds is less than the Outstanding Amount and all recoverable expenses, the deficiency constitutes a debt due to KPHT by the Customer. Where the amount of the proceeds is more than the Outstanding Amount and all recoverable expenses, the surplus shall be paid by KPHT to the Customer.

9. Security Interest

- 9.1 **Security Interest:** The Goods, and all of the Customer's present and future rights in relation to the Goods, are subject to a continuing security interest in favour of KPHT for the payment of all amounts owing, and the performance of all obligations, under any Contract.
- 9.2 **Registration:** The Customer acknowledges that KPHT may, at the Customer'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 Personal Property Securities Register established under the Personal Property Securities Act 1999 (**PPSA**).
- 9.3 **Provide Information:** The Customer shall do all things and provide all information as KPHT may require for the purpose of securing to KPHT the Goods, the payment of all amounts owing and the performance of all of the Customer's obligations under any Contract, and for the purpose of ensuring that KPHT has a perfected first ranking security interest in the Goods and any proceeds. The Customer shall not change its name or other details without first notifying KPHT in writing at least 14 days before such change takes effect.
- 9.4 **Contracting Out:** The Customer:
- 9.4.1 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;
- 9.4.2 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), 131 (court order preventing removal of accession) and 132 (redemption of collateral) of the PPSA; and
- 9.4.3 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.
- 9.5 The terms **accession**, **financing statement**, **personal property**, **verification statement** and **security interest** have the meanings given to them under the PPSA.
- 9.6 **Customer's Obligations:** The Customer will:
- 9.6.1 maintain and keep the Goods (whilst in its possession) in good working order and condition and protected against theft, loss or damage;
- 9.6.2 ensure the proceeds of any sale of Goods are first applied towards the satisfaction of all indebtedness of the Customer to KPHT under any Contract; and
- 9.6.3 permit KPHT 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.

- 9.7 The Customer will not:
- 9.7.1 permit to subsist any other security interest in relation to the Goods which would rank ahead of KPHT 's interest; or
 - 9.7.2 except in the normal course of business, sell, lease or dispose of, or permit the sale, lease or disposal of, the Goods.
- 9.8 **KPHT's Rights:** In addition to any rights that KPHT has under the PPSA, KPHT shall have the right, as the Customer's agent, at any time while any amounts owing by the Customer to KPHT under any Contract remains outstanding, to enter into the premises where Goods are stored and remove them without being responsible for any damage caused in doing so. The Customer shall indemnify KPHT for all such moneys and all costs, charges and expenses in repossessing the Goods.

10. KPHT's Liability

- 10.1 **Type of Liability:** KPHT shall provide the Services at "Limited Carriers Risk" for the purposes of the Act unless the Customer signs the Consignment Note electing "Owners Risk".
- 10.2 **Limitation of Liability:** Subject to the provisions of the Act imposing liability in respect of the loss of or damage to the Goods, KPHT shall not be under any direct or indirect liability whatsoever for any direct or indirect losses, penalties, damages, costs or expenses of any kind whatsoever (including indirect or consequential loss or damage) brought, or incurred by the Customer or any third party, in connection with, the carriage of the Goods or any Contract howsoever caused or arising and whether caused intentionally or arising as the result of negligence of KPHT or otherwise, nor shall KPHT be liable for any loss, damage or injury caused to the Customer's servants, agents, contractors, or other persons whomsoever arising.
- 10.3 **Maximum Liability:** The maximum liability of KPHT in respect of any one unit (as defined by the Act) of Goods carried by KPHT under "Limited Carriers Risk" is limited to the lesser of \$2000.00 or the amount of the actual loss or damage suffered by the Customer. Where the Goods are carried at "Owners Risk", KPHT shall have no liability to the Customer whatsoever.
- 10.4 **Customer liability:** The Customer shall be liable for any loss or damage to any equipment or property belonging to KPHT (whether in the possession of the Customer or otherwise) where such loss or damage is caused directly or indirectly by any act or omission of the Customer.
- 10.5 **Customer Indemnity:** The Customer shall indemnify KPHT against:
- 10.5.1 any claim by any person in respect of any loss, damage or injury arising out of clause **10.2**;
 - 10.5.2 all claims, proceedings, losses, costs, expenses, penalties, fines, damages or other liability whatsoever suffered or incurred by KPHT arising out of, or in connection with, any failure by the Customer to perform its obligations under any Contract.
- 10.6 **Risk and Title:** Risk in all Goods shall pass to KPHT on accepting the Goods for transportation. The Goods title shall at all times remain with the Customer, subject to these Terms.

- 10.7 **Contracting Out:** Where these Terms differ from any provision in the Act then so far as the parties are able, these Terms prevail over any statutory provision and the parties are deemed to have contracted out of those provisions of the Act.

11. Actions against KPHT

- 11.1 **Time Limit:** No action whatsoever shall be brought against KPHT for damage to or partial loss of the Goods occurring while KPHT is responsible for them under any Contract unless:
- 11.1.1 written notice of any claim, giving full particulars of any alleged damage or destruction, as well as the value claimed, is received by KPHT within 48 hrs after the delivery of the Goods; or
 - 11.1.2 a court action shall have been commenced by the Customer in a Court of competent jurisdiction within 6 months from the date of delivery of the Goods.

12. Default, Termination and Suspension

- 12.1 **Grounds for default:** KPHT may suspend or terminate any Contract, and the payment of all amounts owing by the Customer to KPHT under that Contract and any other Contract between KPHT and the Customer shall immediately become due and payable, if the Customer:
- 12.1.1 is in breach of any term of any Contract;
 - 12.1.2 is unable to pay its debts as they fall due or ceases or threatens to cease conducting its business in the normal manner;
 - 12.1.3 enters into, or attempts to enter into, any composition, assignment or other arrangement with, or for the benefit of, its creditors;
 - 12.1.4 becomes, threatens or resolves to become, or is in jeopardy of becoming insolvent;
 - 12.1.5 being a partnership, dissolves, threatens or resolves to dissolve or is in jeopardy of dissolving; or
 - 12.1.6 being a natural person, dies.

13. Confidentiality

- 13.1 **Confidentiality:** If, in the performance of its obligations under any Contract, a party becomes aware of secret and confidential information belonging to another party such party shall keep secret and confidential and not disclose the same to any third party (except those of its officers and employees who are instructed that they are dealing with secret and confidential information that is not to be disclosed).
- 13.2 **Information and Privacy:** The Customer agrees that KPHT may use any information it holds from time to time about the Customer relating to the Customer's credit worthiness and give that information to any other person for credit assessment and debt collection purposes. The Customer agrees that any other information collected by KPHT about the Customer is accessed or collected for the use of KPHT in the course of its business, including direct marketing activities.

14. General

- 14.1 **Force Majeure:** KPHT shall not be liable for any delay or failure to perform any obligation in whole or in part under any Contract or for any loss or damage (including indirect or consequential loss or damage) if such delay or failure is due to Force Majeure.
- 14.2 **Further assurances:** Each party shall make all applications, execute all documents and do all acts and things reasonably required to implement and to carry out its obligations under the any Contract.
- 14.3 **Assignment:** No party shall assign any of its rights or obligations under the any Contract without the prior written consent of the other party, such consent not to be unreasonably withheld.
- 14.4 **Other Terms:** If there is any inconsistency between the components of any Contract, then the Customer agrees that the following order of preference shall prevail:
- 14.4.1 the Terms;
 - 14.4.2 the Account Application Form; and then
 - 14.4.3 the Consignment Note.
- 14.5 **Entire Terms:** The provisions of the Contract constitute the entire arrangement between the parties with respect to its subject matter and supersede all previous agreements and arrangements, whether verbal or written, between the parties with respect to that subject matter. Despite this, should any standard order terms imposed by the Customer be found to form part of an agreement between the Customer and KPHT, then the terms of the Contract shall prevail.