

Warmup New Zealand Ltd (Referred to in these terms of trade as “The Company”) – Terms of Trade

1. GENERAL

a) The Company accepts the customer's order on these terms and conditions and the entire agreement between the Company and the customer is comprised in these terms and conditions, (except to the extent that they are modified in writing and signed by both parties), the completed credit application and the guarantee, if any, and it is expressly agreed that there are no other understandings, representations or warranties of any kind (express or implied) forming part of this contract.

In particular:

- I. Any condition contained in the customer's order which is inconsistent with, qualifies, or is contrary to these conditions shall be of no effect unless that condition is expressly accepted in writing by the Company.
 - II. Any variation, waiver or cancellation of the customer's order shall be of no effect unless accepted in writing by the Company. Where the Company accepts cancellation the Company may levy a handling charge of up to 20% of the price.
 - III. Where the customer and the Company agree to a variation in the quantity of the goods, the goods shall be priced either at the rate applicable to the original quantity or the revised quantity at the absolute discretion of the Company.
- b) Placement by the customer of any order with the Company constitutes an acknowledgement by the customer that the contract between the customer and the Company shall be governed by these terms of trade.
- c) If any terms or conditions or part thereof contained in these terms of trade are held to be invalid, illegal, unenforceable or void for any reason or reasons, all of the remaining terms and conditions (or part thereof) shall remain in full force and effect.
- d) The customer agrees that in the event of default of the settlement of any amount due, the customer shall pay upon demand, all reasonable costs, charges and legal expenses (including costs between solicitor and own client) including any collection costs incurred by the Company in recovering the outstanding amount from the customer.
- e) The customer may not assign all or any of the rights or obligations of the customer under these terms of trade without the prior written consent of the Company.

2. PRICE AND TERMS OF PAYMENT

- a) The Company's prices are subject to alteration without notice and the price payable by the customer for the goods ordered shall be the price ruling at the date the goods are despatched for delivery to the customer. The onus is on the customer to confirm prices prior to delivery.
- b) The Company's prices referred to in this contract, in any Company promotional or advertising materials, or in any quotation which may have formed the basis of this contract are exclusive of Goods and Services Tax unless otherwise stated.
- c) The Company's prices are exclusive of other taxes, duties and other imports which if chargeable are payable by the customer whether they are imposed or brought into force before or after acceptance of the customer's order.
- d) If the goods are exported the price and other moneys, due by the customer shall be paid in New Zealand currency.
- e) All prices are strictly nett and unless otherwise stated in writing by the Company on acknowledging the order are due for payment on the 20th day of the month following the month in which the goods (or any instalment of the goods) are delivered.
- f) Without prejudice to its rights to sue for payment or exercise any other remedy where any payment is not made on the due date the Company may:
- I. Charge the customer interest on the amount outstanding at the rate of five percent (5%) above the current base lending rate for the time being of the Company's bankers from the date of payment until payment is received by the Company but the charging of interest does not extend the time for payment nor imply any forbearance to sue otherwise recover overdue moneys.
 - II. Demand payment of the arrears as well as payment in advance for any undelivered goods before proceeding with manufacture or making any further delivery of any goods or any instalment of goods under this or any other contract between the Company and the customer.
 - III. Rescind this contract or any other contract between the Company and the customer and the customer shall not be entitled to demand or enforce delivery of goods under this or any other contract.
 - IV. The right to restrict or withhold the sale of further goods on credit is reserved where the Company has reason to doubt the customer's ability to pay for such purchases.
- g) If the Company allows payment of debtors accounts by credit card or other means of money transfer or electronic payment the customer will comply with the Company's procedures and charges for doing so and will not withdraw any authority for charging, transferring or debiting on less than one month's notice.

3. DELIVERY

- a) The Company may withhold delivery in terms of clause 2 above.
- b) If the customer fails or refuses or indicates to the Company that the customer will fail or refuse to take or accept delivery, then the goods shall be deemed to have been delivered when the Company was willing to deliver them.
- c) The Company reserves the right to despatch the customer's order in one delivery or by instalments. Where the Company acknowledges an order which provides for delivery by instalments the Company shall be entitled to payment for each instalment delivered (as if it were a separate contract) but failure to deliver any instalment shall not entitle the customer to repudiate the contract as to any remaining instalments.

- d) Any quotations of delivery times by the Company are made in good faith but as estimates and not commitments. The Company shall not be bound by such estimates.
- e) Where the customer requests a particular method of delivery and the Company agrees in writing then the customer shall cover the cost of delivery by that method from the point of despatch of the goods by the Company. Otherwise the Company will select the method of delivery.

4. SHORTAGES

The Company's liability for shortages in the quantity of the goods supplied is limited to making up the shortages or issuing a refund or credit in the event that the shortage cannot be remedied. No claim for shortages in quantity will be allowed unless the customer gives written notification of the shortage in writing within 3 working days of delivery and provides a reasonable opportunity to take all necessary steps to investigate the claim.

5. RISK AND LOSS IN TRANSIT

- a) Risk (including, without limitation, insurance responsibility) of any loss, damage or deterioration of or to the goods shall pass to the customer on collection of the goods by the customer or his agent or the passing of the goods to a carrier (including, without limitation, the Company's own delivery vehicles) for delivery.
- b) Goods leaving the Company's premises are deemed to be adequately packed. Claims made for damage or loss in transit must be made against the carrier in the prescribed manner.
- I. Prior to acknowledging delivery to the carrier the customer must ensure that the complete consignment as per the carrier's note has been received.
 - II. Should there be a shortage or visible damage to outer packaging the carrier's note must be endorsed accordingly.
 - III. Within 3 working days of receipt of consignment the customer must ensure that all product received is in good order and condition.
- c) No claims will be considered after 3 working days of receipt of goods.
- d) While no liability for goods damaged or lost in transit will be accepted by the Company, details of any claim should be advised to the Company.
- e) The liability of the Company in respect of goods that are inadequately packed or where the Company uses its own delivery vehicles to transport the goods to the customer or where risk has not passed to the customer in terms of Clause 3(b) and 8(a) (and whether such liability in either case is in contract or in tort including negligence of the Company, its employees or agents or otherwise howsoever), shall be limited, in the case of inadequately packed goods and failure to deliver, to refunding or crediting the customer with the purchase price and in the case of damage in transit, at the option of the Company to providing replacement goods or refunding or crediting the customer with the purchase price of the damaged goods.
- f) Risk shall pass back to the Company only if the Company exercises its right of repossession pursuant to clause 8(h) and in that regard the following shall apply:
- I. Risk shall pass back to the Company only if the Company takes possession of the goods by removing the goods and
 - II. If any of the goods so repossessed by the Company are goods in respect of which the company shares title with any other party, risk shall pass back to the company only in relation to the Company's share in such goods as defined in Clause 8(e).

6. RETURN OF GOODS FOR CREDIT

- a) The Company is under no obligation to accept the return of goods supplied. Goods supplied in accordance with the customer's order can only be returned with the express approval of the Company. In particular:
- I. Requests to return goods must be submitted in writing within 10 days from the date of supply.
 - II. Where goods are accepted for credit they must be delivered at the customer's expense into the Company's store from where they were purchased in original condition and packaging.
 - III. The original invoice number must be quoted.
 - IV. The Company reserves the right to levy a restocking fee against any returns it may agree to accept. Such fees may be up to 20% and levied at the Company's absolute discretion.
- b) Goods specially imported or brought in or procured on behalf of the customer cannot be returned except with prior written approval from the Company and then only on such terms and conditions as the Company may agree.

7. DISPUTES

In the event that any part of an invoice is disputed the amount not in dispute will be paid promptly in accordance with the payment terms. Thereafter the parties agree to use their best endeavours to promptly resolve any dispute or difference between them and the company may, at its option, require the customer to submit to mediation with the assistance of a qualified mediator.

8. OWNERSHIP

- a) Ownership of all goods sold by the company is retained by the company until full payment is received for all amounts owing (including any default interest pursuant to clause (2) and enforcement and legal costs pursuant to subclause (i) in respect of all goods supplied. This provision is intended to protect the Company in respect of any event where the customer defaults in payment of the goods or any other goods sold by the Company to the customer or any event occurs which could cause the customer to become insolvent, bankrupt or be liquidated or in the event of the insolvency, bankruptcy or liquidation of the customer or any approaches made by the customer to creditors to extend time for or otherwise compromise payment of the customer's debts. In this clause such events are referred to as "Events of Default".
- b) Until such payment is made the customer agrees to:
- I. Enable the goods to be readily identifiable as the property of the Company.
 - II. Maintain the goods so supplied in good order and condition and to return the goods immediately if called upon to do so by the Company.
- c) The customer hereby agrees to meet all costs of and any incidentals in the recovery of the goods as well as any shortfalls between the amount owing and the value of the goods recovered.

- d) In the event of a sale of the goods, or any of them prior to payment in full, the customer shall, as trustee for the Company:
- I. Hold all moneys received by the customer on any such sale of the goods separate from the customer's own money and in the name of and to the credit of the Company and the customer will on request from the company pay such proceeds to the Company.
 - II. Hold all claims against the purchasers of any such goods who have not made payment for the same in trust for the company and the company may, upon the occurrence of any Event of Default, either in its own name or in the name of the customer make claim to and issue proceedings to recover the sale price of such goods. If called upon to do so by the Company, the customer shall assign to the Company all rights against the person to whom the customer has supplied the goods.
- e) In respect of any goods which are mixed with, installed on the customer's premises or used as constituent parts of any product manufactured or constructed by the customer for sale immediately upon such manufacturing or construction occurring:
- I. The Company's ownership of the goods shall be transferred to part ownership of the processed goods; and
 - II. The Company's part ownership shall be an equal share to the proportion that the invoiced value of the Company's goods used in such processing bears to the total invoice value of all goods employed plus the customer's reasonable direct costs of processing. If any dispute shall arise as to the amount of the Company's share, such dispute shall be determined by a chartered accountant, who shall act as sole arbitrator pursuant to the provisions of the Arbitration Act 1996, which accountant shall be appointed if the parties cannot agree by the president for the time being of the New Zealand Society of Accountants or his or her nominee;
- f) The customer shall not, so long as the goods remain the property of the Company, charge or purport to charge the goods nor deal with the goods in any other way than in accordance with the provisions of these terms of trade.
- g) The Company shall be entitled forthwith to cancel the customer's rights under the terms of trade by notice to the customer if the customer defaults in payment on the due date, time for which is strictly of the essence, or fails to comply with any of these general conditions or any terms of any particular contract of sale between the Company and the customer, or if the Company receives any information which, in the opinion of the Company, indicates uncertainty as to the customer's ability to meet its financial commitments.
- h) If any one or more of the events specified in clause 8(a) occurs, or upon cancellation under clause 8(g), or upon cancellation pursuant to any other right, the Company, without prejudice to any other rights or remedies of the Company, shall be entitled.
- I. To recover possession of all goods in respect of which the Company has retained title, including processed goods, either by removing the goods from possession or control of the customer or the customer's purchaser or by impounding the goods in any premises occupied by or under the control of the customer, the duly appointed liquidator or receiver of the customer, the customer's purchaser, or the duly appointed liquidator or receiver of the customer's purchaser
 - II. To employ the services of any person to enter upon and remain upon any premises occupied by or controlled by the customer to exercise any of the preceding rights;
 - III. To give notice to any third party of the Company's right pursuant to these general conditions and of the exercise of any of the Company's rights or remedies and the customer shall have no claim against the Company for any loss, direct or indirect, suffered by the customer as a consequence of such notice being given by the Company.
- i) Upon termination of the customer's rights pursuant to clause 8(g), or pursuant to any other right of the company and without prejudice to any other rights or remedies of the Company, the Company shall be entitled to sell all goods fully or partly owned by the company and the following further provisions shall apply;
- I. On the sale by the Company of any unprocessed goods in respect of which full title has been retained by the Company, the Company shall be entitled to retain the total proceeds of sale and shall have no obligation to account to the customer for any part of the proceeds of sale PROVIDED THAT if the total proceeds of sale exceed in value all sums owed by the customer to the Company pursuant to all contracts between the customer and the Company then the Company shall have no further claim on the customer and shall refund to the customer the difference between the sale price and the total indebtedness of the customer to the Company less any diminution in value of the unprocessed goods and a restocking fee of up to 10% of the total value of the goods either of which may be levied by the Company in its total discretion;
 - II. In the case of processed goods the Company is empowered to sell such goods on behalf of the customer and the Company for their respective rights and interests and shall account to the customer for the customer's share of the proceeds, whether or not any moneys may still be due from the customer to the Company.
- 9. COMPANY'S LIABILITY AND MAINTENANCE GUARANTEE**
- a) The customer acknowledges that all goods acquired from the Company are acquired for business purposes and the Company and the customer hereby agree to contract out of the Consumer Guarantees Act 1993.
- b) The customer shall ensure that the goods ordered are fit and suitable for the purpose for which they are required and the Company is under no liability if they are not.
- c) In the case of goods not of the Company's own manufacture the customer is entitled to only such benefits as the Company may receive under any guarantee given to the Company by the manufacturers in respect thereof. The Company is not liable for any consequential or indirect losses arising out of the supply of any goods in any circumstances whatsoever.
- d) In lieu of any warranty, condition or liability implied by law, the Company's liability in respect of any defect in or failure of the goods supplied or for any loss, injury or damage attributable thereto is limited to making good the replacement or repair of defects arising under normal proper use and maintenance arising solely from faulty design, materials or workmanship within the guarantee period if stated or otherwise within 12 months of the date of supply provided always that such defective parts are promptly returned to the Company. At the termination of the appropriate period all liability on the Company's part ceases.
- e) This warranty does not cover damage from misuse, accident, neglect, installation, modification, adjustment or improper operation or maintenance.
- f) Any advice, recommendation, information, assistance or service ("customer information") provided by the Company in relation to the goods' use or application is given in good faith and is believed to be appropriate and reliable. Any such customer information provided and any statements or representations made by the Company in relation to any goods supplied by the company is provided or are made without liability or responsibility on the part of the Company and this provision precludes any Court from enquiring or determining the questions referred to in Section 4 of the Contractual Remedies Act 1979. The customer acknowledges that it has used its own skill and judgement in selecting and purchasing the goods.
- g) The Company's liability under this contract and the warranty in this clause is confined to the customer named in this contract it being agreed that the Company has no liability to any purchaser of the goods from the customer in that the customer's rights under this contract are not assignable without the prior written consent of the Company.
- 10. ERRORS OR OMISSIONS**
- Clerical errors or omissions, whether in computation or otherwise in any quotation, acknowledgement or invoice, shall be subject to correction.
- 11. FORCE MAJEURE**
- The Company shall not be liable to the customer for any loss or damage directly or indirectly arising out of or in connection with any delay in delivery of the goods or failure to perform any term of this contract where such delay or failure is caused directly or indirectly by an act of God, fire, armed conflict, labour dispute, civil commotion, intervention of a Government, inability to obtain labour, materials or manufacturing facilities, accidents, interruptions of or delay in transportation or any other cause beyond the Company's control.
- 12. COMPLIANCE WITH REGULATIONS**
- The customer shall be solely responsible for obtaining the necessary permits under and for compliance with all legislation, regulations, by-laws or rules having the force of law in connection with the installation and operation of the goods.
- 13. PROPER LAW**
- The contract and these terms of trade shall be governed by New Zealand Law and the New Zealand courts shall have exclusive jurisdiction in connection herewith.
- 14. PRIVACY**
- a) The customer (whether a private individual or a company) authorises the Company to seek information from outside parties concerning the customer's creditworthiness and business practices. This is a continuing authorisation which will apply throughout the course of the trading relationship between the parties. The customer also authorises the Company (on a continuing basis) to disclose such information to any outside party inquiring in good faith.
- b) Where the customer is a company, the same authority is given by the individual directors and senior officers of that Company, concerning information about those individuals.
- c) The Company is authorised to hold any such information as is necessary for the satisfactory conduct of the trading relationship.
- d) The Company is specifically authorised to receive information from or give information to Baycorp Advantage or any other credit reference agency, concerning the credit history of the customer. In particular,
- e) The Company is authorised to use the credit reporting services of Baycorp Advantage or any similar credit reference agency concerning the customer and any guarantor for its database, such information including reference to any default should that occur.
- f) For the avoidance of doubt, all authorities given for information disclosure purposes are continuing authorities, to apply throughout the duration of the trading relationship.
- 15. PERSONAL PROPERTY SECURITIES ACT 1999 ("PPSA")**
- a) Expressions used in this clause 15 have the meaning ascribed to them in the PPSA.
- b) The Company reserves the right at its discretion to register a financing statement in respect of any goods supplied by the Company to the customer pursuant to these Terms of Trade and which are subject to clause 8 of these Terms of Trade and respect of which credit has been extended by the Company to the customer.
- c) The costs of registering a financing statement or a financing change statement shall be paid by the customer and, where applicable, debited by the Company against the customer's account with the Company.
- d) On request by the Company the customer shall promptly execute any documents and do anything else required by the Company to ensure that the security interest created under these Terms of Trade constitutes a perfected security interest over the goods referred to in subclause (b)
- e) The customer shall not agree to allow any person to file a financing statement over any of the goods referred to in subclause (b) without the prior written consent of the company and shall notify the Company immediately if it becomes aware of any person taking steps to file a financing statement against any of such goods.
- f) The customer and guarantor (if any) hereby waive their respective rights to receive a verification statement in respect of any financing statement or financing charge statement pursuant to section 148 of the PPSA.