

Kirby Hiab and Logistic Services Pty Ltd – Terms & Conditions of Cartage

- 1. Definitions**
- 1.1 "KHLs" shall mean Kirby Hiab and Logistic Services Pty Ltd ATF M Kirby Family Trust and its successors and assigns or any person acting on behalf of and with the authority of Kirby Hiab and Logistic Services Pty Ltd ATF M Kirby Family Trust.
- 1.2 "Sub-Contractor" shall mean and include:
- any railways or airways operated by the Commonwealth or any state or any other country or by any contractor; or
 - any other person or entity with whom KHLs may arrange for the carriage or storage of any Goods the subject of the contract; or
 - any person who is now or hereafter a servant, agent, employee or sub-contractor of any of the persons referred to in clauses 1.2(a) and 1.2(b).
- 1.3 "Customer" shall mean the Customer or any person or persons acting on behalf of and with the authority of the Customer. Where more than one Customer has entered into this agreement, the Customers shall be jointly and severally liable for all payments of the Price.
- 1.4 "Consignee" shall mean the person to whom the Goods are to be delivered by way of KHLs's Services.
- 1.5 "Guarantor" means that person (or persons) who agrees herein to be liable for the debts of the Customer on a principal debtor basis.
- 1.6 "Goods" shall mean cargo together with any container, packaging, or pallet(s) to be moved from one place to another by way of KHLs's Services, or for storage by KHLs.
- 1.7 "Services" shall mean all services supplied by KHLs to the Customer and are as described on the quotations, invoices, consignment note, airway bills, manifests, sales order or any other forms as provided by KHLs to the Customer and includes any advice or recommendations.
- 1.8 "Price" shall mean the cost of the Services as agreed between KHLs and the Customer subject to clause 3 of this contract.
- 2. The Commonwealth Competition and Consumer Act 2010 and Fair Trading Acts**
- 2.1 Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the Fair Trading Acts in each of the States and Territories of Australia (including any substitute to those Acts or re-enactment thereof), except to the extent permitted by those Acts where applicable.
- 2.2 Where the Customer purchases Services as a consumer these terms and conditions shall be subject to any laws or legislation governing the rights of consumers and shall not affect the consumer's statutory rights.
- 2.3 Liability of KHLs arising out of any one incident whether or not there has been any declaration of value of the Goods, for breach of warranty implied into these terms and conditions by the Competition and Consumer Act 2010 or howsoever arising, is limited to any of the following as determined by KHLs:
- the supplying of the Services again; or
 - the payment of the cost of having the Services supplied again; or
 - where the Customer is a consumer as defined in the Competition and Consumer Act 2010 then the Customer may also be entitled to a refund.
- 3. Acceptance**
- 3.1 Any instructions received by KHLs from the Customer for the supply of Services shall constitute acceptance of the terms and conditions contained herein.
- 3.2 Upon acceptance of these terms and conditions by the Customer the terms and conditions are irrevocable and can only be rescinded in accordance with these terms and conditions or with the written consent of the manager of KHLs.
- 3.3 These terms and conditions are to be read in conjunction with KHLs's quotation, consignment note, agreement, airway bills, manifests, or any other forms as provided by KHLs to the Customer. If there are any inconsistencies between these documents then the terms and conditions contained in this document shall prevail.
- 3.4 The Customer shall give KHLs not less than fourteen (14) days prior written notice of any proposed change of ownership of the Customer or any change in the Customer's name and/or any other change in the Customer's details (including but not limited to, changes in the Customer's address, facsimile number, or business practice). The Customer shall be liable for any loss incurred by KHLs as a result of the Customer's failure to comply with this clause.
- 4. Price And Payment**
- 4.1 At KHLs's sole discretion the Price shall be either;
- as indicated on invoices provided by KHLs to the Customer in respect of Services supplied; or
 - KHLs's quoted Price as indicated on KHLs's Price List (subject to clause 4.2 & 4.3) which shall be binding upon KHLs provided that the Customer shall accept in writing KHLs's quotation within thirty (30) days.
- 4.2 KHLs may by giving notice to the Customer increase the Price of the Services to reflect any increase in the cost to KHLs beyond the reasonable control of KHLs (including, without limitation, foreign exchange fluctuations, or increases in taxes, customs duties, insurance premiums, or warehousing costs).
- 4.3 The Carrier may charge freight by weight, measurement or value, and may at any time re-weight, or re-value or re-measure or require the Goods to be re-weighted, or re-valued or re-measured and charge proportional additional freight accordingly.
- 4.4 Time for payment for the Services shall be of the essence and will be stated on the invoice, consignment note, airway bills, manifests or any other forms. If no time is stated then payment shall be due seven (7) days following the end of the month of the date of the invoice.
- 4.5 Payment will be made by cheque, or by bank cheque, or by credit card (plus a surcharge of up to two percent (2%) of the Price), or by direct credit, or by any other method as agreed to between the Customer and KHLs.
- 4.6 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.
- 5. KHLs Not Common Carrier**
- 5.1 KHLs is not a Common Carrier and will accept no liability as such. All articles are carried or transported and all storage and other services are performed by KHLs subject only to these conditions and KHLs reserves the right to refuse the carriage or transport of articles for any person, corporation or body, and the carriage or transport of any class of articles at its discretion.
- 6. Customer-Packed Containers**
- 6.1 If a container has not been stowed by or on behalf of KHLs KHLs shall not be liable for loss of or damage to the Goods caused by:
- the manner in which the container has been stowed; or
 - the unsuitability of the Goods for carriage or storage in containers; or
 - the unsuitability or defective condition of the container.
- 7. Nomination Of Sub-Contractor**
- 7.1 The Customer hereby authorises KHLs (if it should think fit to do so) to arrange with a Sub-Contractor for the carriage of any Goods that are the subject of the contract. Any such arrangement shall be deemed to be ratified by the Customer upon delivery of the said Goods to such Sub-Contractor, who shall thereupon be entitled to the full benefit of these terms and conditions to the same extent as KHLs. In so far as it may be necessary to ensure that such Sub-Contractor shall be so entitled KHLs shall be deemed to enter into this contract for its own benefit and also as agent for the Sub-Contractor.
- 8. KHLs's Servants or Agents**
- 8.1 The Customer undertakes that no claim or allegation shall be made against any servant or agent of KHLs which attempts to impose upon any of them any liability whatsoever in connection with the Goods and, if any such claim or allegation should nevertheless be made, to indemnify KHLs and any such servant or agent against all consequences thereof.
- 9. Method Of Transport**
- 9.1 If the Customer instructs KHLs to use a particular method of carriage whether by road, rail, sea or air KHLs will give priority to the method designated but if that method cannot conveniently be adopted by KHLs the Customer shall be deemed to authorise KHLs to carry or have the Goods carried by another method or methods.
- 10. Route Deviation**
- 10.1 The Customer shall be deemed to authorise any deviation from the usual route or manner of carriage of Goods that may in the absolute discretion of KHLs be deemed reasonable or necessary in the circumstances.
- 11. Charges Earned**
- 11.1 KHLs's charges shall be considered earned in the case of Goods for carriage as soon as the Goods are loaded and dispatched from the Customer's premises.
- 12. Demurrage**
- 12.1 The Customer will be and shall remain responsible to KHLs for all its proper charges incurred for any reason. A charge may be made by KHLs in respect of any delay in excess of thirty (30) minutes in loading or unloading occurring other than from the default of KHLs. Such permissible delay period shall commence upon KHLs reporting for loading or unloading. Labour to load or unload the vehicle shall be the responsibility and expense of the Customer or Consignee.
- 13. Dangerous Goods**
- 13.1 Unless otherwise agreed in advance in writing with KHLs the Customer or his authorised agent shall not tender for carriage or for storage any explosive, inflammable or otherwise Dangerous Goods. The Customer shall be liable for and hereby indemnifies KHLs for all loss or damage whatsoever caused by any Dangerous Goods.
- 14. Consignment Note**
- 14.1 It is agreed that the person delivering any Goods to KHLs for carriage or forwarding is authorised to sign the consignment note for the Customer.
- 15. Customer's Responsibility**
- 15.1 The Customer expressly warrants to KHLs that the Customer is either the owner or the authorised agent of the owner of any Goods or property that is the subject matter of this contract of cartage and/or storage and by entering into this contract the Customer accepts these conditions of contract for the Consignee as well as for all other persons on whose behalf the Customer is acting.
- 16. Delivery**
- 16.1 KHLs is authorised to deliver the Goods at the address given to KHLs by the Customer for that purpose and it is expressly agreed that KHLs shall be taken to have delivered the Goods in accordance with this contract if at that address KHLs obtains from any person a receipt or a signed delivery docket for the Goods.
- 16.2 KHLs may deliver the Goods by separate instalments (in accordance with the agreed delivery schedule). Each separate instalment shall be invoiced and paid for in accordance with the provisions in this contract.
- 16.3 Delivery of the Goods to a third party nominated by the Customer is deemed to be delivery for the purposes of this agreement.
- 16.4 It is the Customer's sole responsibility to address adequately each consignment and to provide written delivery instructions to enable effective delivery.
- 16.5 The failure of KHLs to deliver shall not entitle either party to treat this contract as repudiated.
- 17. Loss Or Damage**
- 17.1 Subject to any statutory provisions imposing liability in respect of the loss of or damage to the Goods (including but not limited to chilled, frozen, refrigerated or perishable Goods):
- KHLs shall not be under any liability for any damage to, loss, deterioration, mis-delivery, delay in delivery or non-delivery of the Goods (whether the Goods are or have been in the possession of KHLs or not) nor for any instructions, advice, information or service given or provided to any person, whether in respect of the Goods or any other thing or matter, nor for any consequential or indirect loss, loss of market or consequences of delay; and
 - the Customer will indemnify KHLs against all claims of any kind whatsoever, howsoever caused or arising brought by any person in connection with any matter or thing done, said or omitted by KHLs in connection with the Goods.
- 18. Insurance**
- 18.1 The Customer acknowledges that:
- the Goods are carried and stored at the Customer's sole risk and not at the risk of KHLs; and
 - KHLs is under no obligation to arrange insurance of the Goods and it remains the Customer's responsibility to ensure that the Goods are insured adequately or at all; and
 - under no circumstances will KHLs be under any liability with respect to the arranging of any such insurance and no claim will be made against KHLs for failure to arrange or ensure that the Goods are insured adequately or at all.
- 19. Default & Consequences Of Default**
- 19.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and one half percent (2.5%) per calendar month (and at KHLs's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 19.2 In the event that the Customer's payment is dishonoured for any reason the Customer shall be liable for any dishonour fees incurred by KHLs.
- 19.3 If the Customer defaults in payment of any invoice when due, the Customer shall indemnify KHLs from and against all costs and disbursements incurred by KHLs in pursuing the debt including legal costs on a solicitor and own client basis and KHLs's collection agency costs.
- 19.4 Without prejudice to any other remedies KHLs may have, if at any time the Customer is in breach of any obligation (including those relating to payment), KHLs may suspend or terminate the supply of Services to the Customer and any of its other obligations under the terms and conditions. KHLs will not be liable to the Customer for any loss or damage the Customer suffers because KHLs exercised its rights under this clause.
- 19.5 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 (up to a maximum of \$200) shall be levied for administration fees which sum shall become immediately due and payable.
- 19.6 Without prejudice to KHLs's other remedies at law KHLs shall be entitled to cancel all or any part of any order of the Customer which remains unperformed in addition to and without prejudice to any other remedies and all amounts owing to KHLs shall, whether or not due for payment, become immediately payable in the event that:
- any money payable to KHLs becomes overdue, or in KHLs's opinion the Customer will be unable to meet its payments as they fall due; or
 - the Customer becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
 - a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Customer or any asset of the Customer.
- 20. Unpaid Seller's Rights to Dispose of Goods**
- 20.1 KHLs shall have a lien on any Goods (and any documents relating to those Goods) in the possession or control of KHLs for all sums payable by the Customer to KHLs, and KHLs shall have the right to sell such Goods or cargo by public auction or private treaty after giving notice to the Customer. KHLs shall be entitled to retain the sums due to it, in addition to the charges incurred in detention and sale of such Goods or cargo, from the proceeds of sale and shall render any surplus to the entitled person.
- 21. Personal Property Securities Act 2009 ("PPSA")**
- 21.1 In this clause:
- financing statement has the meaning given to it by the PPSA;
 - financing change statement has the meaning given to it by the PPSA;
 - security agreement means the security agreement under the PPSA created between the Customer and KHLs by these terms and conditions; and
 - security interest has the meaning given to it by the PPSA.
- 21.2 Upon assenting to these terms and conditions in writing the Customer acknowledges and agrees that these terms and conditions:
- constitute a security agreement for the purposes of the PPSA; and
 - create a security interest in all Goods being transported by KHLs which are the subject of a lien invoked by KHLs.
- 21.3 The Customer undertakes to:
- promptly sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which KHLs may reasonably require to:
 - register a financing statement or financing change statement in relation to a security interest on the Personal Property Securities Register;
 - register any other document required to be registered by the PPSA; or
 - correct a defect in a statement referred to in clause 21.3(a)(i) or 21.3(a)(ii);
 - indemnify, and upon demand reimburse, KHLs for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register established by the PPSA or releasing any Goods charged thereby;
 - not register a financing change statement in respect of a security interest without the prior written consent of KHLs;
- (d) not register, or permit to be registered, a financing statement or a financing change statement in relation to the Goods in favour of a third party without the prior written consent of KHLs.
- 21.4 KHLs and the Customer agree that sections 96, 115 and 125 of the PPSA do not apply to the security agreement created by these terms and conditions.
- 21.5 The Customer hereby waives its rights to receive notices under sections 95, 118, 121(4), 130, 132(3)(a) and 132(4) of the PPSA.
- 21.6 The Customer waives its rights as a grantor and/or a debtor under sections 142 and 143 of the PPSA.
- 21.7 Unless otherwise agreed to in writing by KHLs, the Customer waives its right to receive a verification statement in accordance with section 157 of the PPSA.
- 21.8 The Customer shall unconditionally ratify any actions taken by KHLs under clauses 21.3 to 21.5.
- 22. Security And Charge**
- 22.1 Despite anything to the contrary contained herein or any other rights which KHLs may have howsoever:
- where the Customer and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Customer and/or the Guarantor agree to mortgage and/or charge all of their joint and/or several interest in the said land, realty or any other asset to KHLs or KHLs's nominee to secure all amounts and other monetary obligations payable under the terms and conditions. The Customer and/or the Guarantor acknowledge and agree that KHLs (or KHLs's nominee) shall be entitled to lodge where appropriate a caveat, which caveat shall be released once all payments and other monetary obligations payable hereunder have been met;
 - should KHLs elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Customer and/or Guarantor shall indemnify KHLs from and against all KHLs's costs and disbursements including legal costs on a solicitor and own client basis;
 - the Customer and/or the Guarantor (if any) agree to irrevocably nominate constitute and appoint KHLs or KHLs's nominee as the Customer's and/or Guarantor's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause 22.1.
- 23. Privacy Act 1988**
- 23.1 The Customer and/or the Guarantor's (herein referred to as the Customer) agree for KHLs to obtain from a credit reporting agency a credit report containing personal credit information about the Customer in relation to credit provided by KHLs.
- 23.2 The Customer agrees that KHLs may exchange information about the Customer with those credit providers either named as trade referees by the Customer or named in a consumer credit report issued by a credit reporting agency for the following purposes:
- to assess an application by the Customer; and/or
 - to notify other credit providers of a default by the Customer; and/or
 - to exchange information with other credit providers as to the status of this credit account, where the Customer is in default with other credit providers; and/or
 - to assess the creditworthiness of the Customer.
- The Customer understands that the information exchanged can include anything about the Customer's creditworthiness, credit standing, credit history or credit capacity that credit providers are allowed to exchange under the Privacy Act 1988.
- 23.3 The Customer consents to KHLs being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988).
- 23.4 The Customer agrees that personal credit information provided may be used and retained by KHLs for the following purposes (and for other purposes as shall be agreed between the Customer and KHLs or required by law from time to time):
- the provision of Services; and/or
 - the marketing of Services by KHLs, its agents or distributors; and/or
 - analysing, verifying and/or checking the Customer's credit, payment and/or status in relation to the provision of Services; and/or
 - processing of any payment instructions, direct debit facilities and/or credit facilities requested by the Customer; and/or
 - enabling the daily operation of Customer's account and/or the collection of amounts outstanding in the Customer's account in relation to the Services.
- 23.5 KHLs may give information about the Customer to a credit reporting agency for the following purposes:
- to obtain a consumer credit report about the Customer;
 - to allow the credit reporting agency to create or maintain a credit information file containing information about the Customer.
- 23.6 The information given to the credit reporting agency may include:
- personal particulars (the Customer's name, sex, address, previous addresses, date of birth, name of employer and driver's licence number);
 - details concerning the Customer's application for credit or commercial credit and the amount requested;
 - advice that KHLs is a current credit provider to the Customer;
 - advice of any overdue accounts, loan repayments, and/or any outstanding monies owing which are overdue by more than sixty (60) days, and for which debt collection action has been started;
 - that the Customer's overdue accounts, loan repayments and/or any outstanding monies are no longer overdue in respect of any default that has been listed;
 - information that, in the opinion of KHLs, the Customer has committed a serious credit infringement (that is, fraudulently or shown an intention not to comply with the Customer's credit obligations);
 - advice that cheques drawn by the Customer for one hundred dollars (\$100) or more, have been dishonoured more than once;
 - that credit provided to the Customer by KHLs has been paid or otherwise discharged.
- 24. Cancellation**
- 24.1 KHLs may cancel any contract to which these terms and conditions apply or cancel the Services at any time before the Services are completed by giving written notice to the Customer. On giving such notice KHLs shall repay to the Customer any sums paid in respect of the Price. KHLs shall not be liable for any loss or damage whatever arising from such cancellation.
- 24.2 In the event that the Customer cancels the Services, then the Customer shall be liable for any loss incurred by KHLs (including, but not limited to, any loss of profits) up to the time of cancellation.
- 25. General**
- 25.1 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.
- 25.2 If any provisions of these terms and conditions are inconsistent with the PPSA, the PPSA shall prevail to the extent of that inconsistency.
- 25.3 These terms and conditions and any contract to which they apply shall be governed by the laws of Western Australia and are subject to the jurisdiction of the courts of Perth, Western Australia.
- 25.4 The Customer shall not be entitled to set off against or deduct from the Price any sums owed or claimed to be owed to the Customer by KHLs.
- 25.5 KHLs 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 KHLs notifies the Customer of such change. Except where KHLs supplies further Services to the Customer and the Customer accepts such Services, the Customer shall be under no obligation to accept such changes.
- 25.6 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.
- 25.7 The terms and conditions set out herein shall prevail over the terms and conditions set out in any document used by the Customer, the owner or any other person having an interest in the Goods and purporting to have a contractual effect.
- 25.8 The failure by KHLs to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect KHLs's right to subsequently enforce that provision.