

SECTION 4 GENERAL CONDITIONS OF CARRIAGE

4.1 DEFINITIONS AND RESPONSIBILITIES

4.1.1 Definitions

In these Conditions, unless the context otherwise requires.

"**Act**" – means the Carriage of Goods Act 1979 and includes any amendments thereto;

"**Actual Carrier**" – has the meaning given to it under the Act;

"**Business Day**" – means any day between 0800 hours and 1700 hours which is not a Saturday, Sunday or public holiday under the Holidays Act 2003;

"**Conditions**" – means these General Conditions of Carriage, as amended from time to time by KiwiRail;

"**Consignment Note**" – means the KiwiRail document (including in electronic form) titled "Consignment Note" containing details of the Freight;

"**Contract**" – has the meaning given to it in clause 4.2.2 of these Conditions;

"**Dangerous Goods**" – means any substance which, if discharged, may impair human, plant or animal life, may adversely affect the environment or may damage property and includes any substance with one or more of the following properties:

- (a) explosiveness or flammability;
- (b) corrosiveness;
- (c) a capacity to oxidise;
- (d) toxicity;
- (e) infectiousness; and
- (f) radioactivity;

"**Dangerous Goods Rule**" – means the Land Transport Rule: Dangerous Goods 2005 and includes any amendments thereto;

"**Delivery Date**" – means the date on which the Freight is delivered to the delivery address specified in the Freight Confirmation or is otherwise available for collection by you;

"**Freight**" – means in each relevant case the "goods" as defined in the Act that we agree to carry for you;

"**Freight Confirmation**" – means the document (including in electronic form) issued by us to you recording our agreement to carry the Freight described in the document;

"**Freight Handling Code**" – means the Freight Handling Code referred to in clause 4.2.7;

"**Freight Payer Code**" – means a KiwiRail invoice account code which allows payment by way of account rather than by cash;

"Freight Rates" – means the charges payable by you to us for the carriage of Freight being:

- (a) the charges agreed to by us in writing; or
- (b) if there are no such agreed charges, our rates applicable at the time we accept the Freight for carriage;

"Freight Rates Note" – means the document we provide to you setting out the Freight Rates (as described in paragraph (a) of the definition of "Freight Rates") applicable to the Freight Services;

"Freight Services" – means services provided by KiwiRail for the carriage of Freight;

"KiwiRail" – means KiwiRail Limited;

"Maritime Rule" – means the Maritime Rule Part 24A: Carriage of Cargoes – Dangerous Goods and includes any amendments thereto;

"Temperature Controlled Freight" – means Freight which is required to be kept at a constant temperature or within a range of temperatures in order to prolong its useful life;

"Vehicle" – means any truck, van, ship or other vehicle or any wagon, container or conveyance of any kind, except where the context otherwise requires;

"We", "Our", "Us" – refer to KiwiRail, our actual agents and where applicable, any Actual Carrier;

"Working Hour" – means any hour on any day of the week, including Saturday, Sunday and public holidays but excluding Christmas Day;

"You" and "Your" – means the person to whom we address the Freight Confirmation.

4.1.2 Interpretation

- (a) Headings contained in these Conditions are included for reference only.
- (b) Words in the singular include the plural and vice versa.
- (c) "Including" and similar words do not imply any limitation.
- (d) References to clauses are to clauses in these Conditions.
- (e) A reference to a statute or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them (whether before or after the date of these Conditions).

4.1.3 Governing law

These Conditions and the Contract are governed by New Zealand law. New Zealand courts have non-exclusive jurisdiction.

4.2 APPLICATION

4.2.1 Governing Terms

The Contract governs the provision and receipt of the Freight Services.

4.2.2 Priority of terms and conditions

In the case of conflict with other documents, the following order of priority (unless otherwise expressly stated in these Conditions) shall apply:

- (a) the Freight Confirmation;
 - (b) the Consignment Note (if any);
 - (c) the Freight Rates Note;
 - (d) the Freight Handling Code (other than section 4 of that Code) and other written guidelines issued by us concerning the carriage of Freight or the operation of the Freight Services; and
 - (e) these Conditions,
- together, the "**Contract**".

4.2.3 Entire Agreement

To the extent allowed by law, the Contract constitutes the entire agreement between us and you for the Freight Services for the relevant Freight and excludes any other terms, agreement and arrangement, including those in any proposal or other document provided by or to you or by or to any third party. You agree that you have not relied on any representation (other than as set out in the Contract) when entering into this Contract.

4.2.4 Overriding law

If any provision of the Contract is or becomes unenforceable, illegal or invalid for any reason it shall be deemed to be severed from the Contract without affecting the validity of the remainder of the Contract and shall not affect the enforceability, legality, validity or application of any other provision of the Contract.

4.2.5 Business Customers

Where the Freight Services are used for business purposes, none of the rights or remedies provided under the Consumer Guarantees Act 1993 will apply.

4.2.6 No waiver

Nothing in the Contract represents a waiver or surrender by us of any legal right, immunity, limitation or privilege.

4.2.7 Freight Handling Code and amendments to these Conditions

These Conditions form part of the Freight Handling Code, being a code for standards and best practice for rail transportation of freight, issued by us. The version of the Conditions and Freight Handling Code that applies to our provision of the Freight Services to you are those published on <http://www.kiwirailfreight.co.nz/> (or successor website) at the time your Freight is accepted by us in accordance with clause 4.4. We may amend the Conditions and Freight Handling Code from time to time and will publish any amendments on <http://www.kiwirailfreight.co.nz/> (or successor website). These amendments take effect immediately once they are published on the website and you agree to be bound by any amendments.

4.3 RATES AND CHARGES

4.3.1 Payment of Freight Rates

You will be responsible for paying the Freight Rates, any tax or levies (including goods and services tax) or similar charge imposed by government, or by any regional or other authority in respect of, or incidental to, the Freight Services, a fuel adjustment factor (if applicable) and all other charges in respect of the Freight Services.

4.3.2 Freight Rates

We may at our discretion fix or impose special Freight Rates or vary existing Freight Rates.

4.3.3 Payment

Payment for Freight Services must be made either before carriage or by way of an authorised Freight Payer Code. If paying by way of a Freight Payer Code, payment is due to us within 14 Business Days of the date of invoice.

4.3.4 Interest on overdue amounts

If you fail to pay an amount owing to us on the due date we may charge you interest, on a daily basis, at the rate of 5% per annum above the commercial overdraft lending rate of the Bank of New Zealand (or another major bank in New Zealand selected by us). Interest may be charged on the amount owing (including interest payable under this clause) from the due date until the date it is paid in full.

4.3.5 Weighing and Measuring of Freight

We reserve the right to check-weigh and check-measure your Freight and alter any Freight Confirmation or Consignment Note accordingly. If:

- (a) you request a weight certificate; or
- (b) the weight or measurement of the Freight, as determined by the check, exceeds your declared weight or measurement of the Freight ("**excess Freight**"),

any check-weighing or check-measuring and any Freight Services for the excess Freight undertaken by us will be at your expense. We do not accept responsibility for, or guarantee, our weighing or measurement.

4.3.6 Pallets, Packaging etc

All packaging, pallets and other such items in which Freight is packed or stored are deemed to form part of the Freight for the purposes of assessing the weight and measurement of the Freight and calculating the Freight Rates payable for such Freight.

4.3.7 Set-off

In no circumstances will you be entitled to set off any moneys owed by you to us against any claims for loss of or damage to any Freight or any other claims under the Contract.

4.3.8 Quotes

Any written quote which we give in respect of the carriage of Freight will remain open for a period of 30 days, unless otherwise specified in the quote. We will not be bound by any quote unless it is in writing.

4.4 ACCEPTANCE, INSPECTION AND DELIVERY OF FREIGHT

4.4.1 Freight acceptance

Subject to clause 4.4.2, Freight is accepted for carriage at the later of:

- (a) the time we issue a Freight Confirmation in respect of that Freight; and
- (b) the time we take possession of that Freight.

4.4.2 Right to decline to accept

We reserve the right to refuse Freight for any reason without explanation, or to only accept your Freight under special arrangements or conditions.

4.4.3 Right to inspect Freight

We may, at your risk and expense, inspect any Freight before or after accepting it for carriage. You must provide us with all reasonable assistance in our inspection. We do not incur any liability to you or to anyone else in respect of the Freight, and the warranty or warranties which you give to us in respect of the Freight shall not be limited or otherwise affected, by reason of us either having inspected or having failed to inspect the Freight.

4.5 OUR LIABILITY

4.5.1 Liability to You

Subject to the limitations and other provisions of the Contract, our liability to you:

- (a) for carriage of your Freight starts at the time we accept the Freight for carriage pursuant to clause 4.4.1 and ceases at the earlier of the:
 - (i) time we deliver the Freight to you (or the third party to whom you intended the Freight to be consigned);
 - (ii) time you collect the Freight; and
 - (iii) date that is five days after we notify you that the Freight is ready for collection; and
- (b) for the Freight Services is, subject to 4.5.1(a), at "limited carrier's risk" as defined in the Act.

4.5.2 Limitation of liability

Without limiting clause 4.5.1, we are not liable to you (whether in contract, tort (including negligence), or otherwise) for:

- (a) any amount exceeding the lesser of:
 - (i) the loss or damage suffered by you; and
 - (ii) the sum provided in section 15(1) of the Act; and
- (b) any loss or damage to the extent arising directly or indirectly:

- (i) from your act or omission (regardless of whether you are negligent or at fault or not);
- (ii) from, or is contributed to by, incorrect information provided by you or on your behalf;
- (iii) from any failure by you to comply with the Contract; or
- (iv) from circumstances beyond our reasonable control.

4.5.3 No consequential or indirect loss

We are not liable (whether in contract, tort (including negligence), or otherwise) for any loss of profits, loss of income or revenue, loss of anticipated savings, and any indirect or consequential loss or damage of any kind, including any loss or damage of the kinds referred to in sections 15(2)(b) and (c) of the Act.

4.5.4 Compliance with laws

We are not liable for any loss or damage arising from what we reasonably believe to be our compliance with any laws or government regulations, orders or requirements, or from your failure to comply with any laws or regulations, orders or requirements.

4.5.5 Liability in respect of other services

Where we provide any service to you other than the carriage of Freight, including the provision of refrigerated or other containers or the provision of storage facilities, our liability to you (whether in contract, tort (including negligence), or otherwise) for any loss or damage suffered or incurred by you in connection with that service is limited to the amount charged by us for that service and is further limited by clauses 4.5.2, 4.5.3, 4.5.4 and 4.5.8.

4.5.6 Notice of claim

To the maximum extent to which we are able to contract out of the Act, the following provisions apply.

- (a) Notice of any claim against us (whether for loss of or failure to deliver all or part of the Freight, damage to all or part of the Freight, or otherwise) must be received by us within 7 days after the Delivery Date or within 14 days of the date of despatch of the Freight, whichever is the earlier.
- (b) Notices pursuant to subclause (a) above must be given in writing to the KiwiRail key account executive assigned to you and be accompanied by our invoice in respect of the carriage of the Freight and such other information as we may reasonably require. Notices not complying with this subclause will be deemed not to have been given.
- (c) No action or claim may be brought against us (whether for loss of or failure to deliver all or part of the Freight, damage to all or part of the Freight, or otherwise) unless such claim or action is brought within 6 months of the date on which we accept the Freight for carriage pursuant to clause 4.4.1.

4.5.7 Freight Handling Code

You must comply with the Freight Handling Code at all times. Notwithstanding anything else contained in the Contract, we will not be liable for any damage to your Freight

where such loss or damage arises as a result of your failure to comply with the Freight Handling Code.

4.5.8 Liability to third parties

We are not liable in contract, tort (including negligence), or otherwise for any direct or indirect losses, penalties, damages, costs or expenses of any kind (including loss of revenue, income or profits, or consequential loss) brought, claimed, suffered or incurred by any third party in connection with our act or omission in relation to the Contract or the services we provide in connection with the Contract, whether caused intentionally or arising as a result of our negligence or otherwise, and whether or not we are aware or ought to be aware that such losses, penalties, damages, costs or expenses may occur.

4.5.9 Employees, contractors, representatives and agents

The exclusions and limitations of liability set out in this clause 4.5 and the indemnity set out in clause 4.6.3 below also apply to, and are for the benefit of, our employees, contractors, representatives and agents together with any Actual Carrier and their employees, contractors, representatives and agents. The aggregate amount recoverable from us and any of the people referred to in this clause, will not exceed the maximum amount of our liability.

4.5.10 Calculation of the Freight Rates

The parties agree that the Freight Rates have been calculated on the basis that the limitations on liability contained in this clause 4.5 are reasonable and are enforceable in accordance with their terms.

4.6 YOUR LIABILITY TO US

4.6.1 Damage to Freight or equipment

You are liable to us for all loss or damage to any Freight or any equipment or property (whether in your possession or otherwise) belonging to us or our employees, contractors, representatives or agents or any Actual Carrier or their employees, contractors, representatives or agents, where such loss or damage arises directly or indirectly from your act or omission (regardless of whether you are negligent or at fault or not) or any failure by you to comply with the Contract.

4.6.2 Return of KiwiRail equipment

If you use any of our equipment or property you must return it to us within 48 Working Hours following its use or, if earlier, at our request, and it must be in the same condition as when you received it.

4.6.3 Indemnity

You will indemnify us against all costs (including costs of and incidental to us enforcing our legal rights against you on a solicitor and client basis and reasonable market rates for our internal labour costs), claims and expenses suffered or incurred by us which arise directly or indirectly from your act or omission, negligence on your part and/or any failure by you to comply with the Contract.

4.7 SPECIAL FREIGHT

The terms and conditions contained in this clause 4.7 apply in addition to and, to the extent inconsistent with, prevail over the Freight Handling Code.

4.7.1 Dangerous Goods

Dangerous Goods are carried subject to the following:

- (a) you must supply us with any declaration or other documentation required by us or by law before we take possession of the Dangerous Goods; and
- (b) without limiting clause 4.8.1, you must ensure Dangerous Goods are packed, labelled and loaded in accordance with:
 - (i) all laws and regulations applicable to Dangerous Goods; and
 - (ii) any applicable guidelines or codes of practice.

4.7.2 Removal of Dangerous Goods

- (a) Dangerous Goods, other than Class 1 Explosives designated under the Dangerous Goods Rule or Maritime Rule, must be collected by you within 8 hours of such Dangerous Goods being available for collection.
- (b) Dangerous Goods designated as Class 1 Explosives under the Dangerous Goods Rule or Maritime Rule must be collected by you within 1 hour of such Dangerous Goods being available for collection.
- (c) Dangerous Goods not so collected will be at your risk and responsibility.
- (d) We may, at your risk and expense, dispose of any Dangerous Goods not collected within the foregoing timeframes.

4.7.3 Temperature Controlled Freight

Temperature Controlled Freight is carried subject to the following:

- (a) we will not be liable for any loss or damage sustained or incurred as a result of Temperature Controlled Freight being carried at any incorrect temperature if you fail to advise us in writing of the temperature at which such Freight should be carried, prior to the time that it is accepted for carriage; and
- (b) we reserve the right to check the temperature of Temperature Controlled Freight at any time by probe-testing or other such means as we determine appropriate. If you do not permit such testing then we shall have no liability whatsoever in the event that the Temperature Controlled Freight is damaged as a result of being carried at an incorrect temperature.

4.8 PACKING AND LOADING

4.8.1 Warranties

You warrant that the Freight:

- (a) complies with all laws and regulations (including the Dangerous Goods Rule and Maritime Rule) relating to the nature, packaging, labelling, storage and carriage of that Freight;
- (b) complies with the requirements of the Freight Handling Code; and

- (c) is properly and securely packed in such a manner as to ensure that it is safe for transport and is able to withstand the ordinary risks of storage and carriage by any Vehicle, having regard to its nature.

4.8.2 Loading of Vehicles

Without limiting clause 4.3, where you load the Freight, we may charge for reloading, adjusting and additional carriage at Freight Rates or else refuse to carry the Freight if the load exceeds the weight or measurement specified on the Vehicle and/or the dimensions set out in the Freight Handling Code, if other applicable terms and conditions regarding loading have not been adhered to or if we consider the load to be unevenly distributed or otherwise unsafe.

4.8.3 Liability for failure to load correctly

You will load all Vehicles and Freight in accordance with the Freight Handling Code and ensure that such Freight is properly and securely loaded and will not damage KiwiRail's property or equipment. You are liable for all loss, damage and claims suffered or incurred by us, which arise directly or indirectly from your failure to load a Vehicle or Freight in accordance with the Freight Handling Code or any other guidelines given by us or in any manner which would be considered unsafe or dangerous by a reasonable and prudent consignor.

4.8.4 Additional charges

If the Freight or its packaging is such that we incur additional costs in handling it, you are liable to pay those additional costs including any costs we incur as a result of the packaging of the Freight not conforming to the requirements of the person who receives the Freight.

4.8.5 Loading / unloading of heavy Freight

You must load and unload Freight at your own risk and expense, including at terminals which do not have suitable lifting equipment for the loading and unloading of the Freight.

4.8.6 Private siding traffic

We may fill up a Vehicle travelling to or from a private siding which is not loaded to its full carrying capacity.

All Freight loaded at a private siding is deemed to be "at owner's risk" as defined in the Act.

4.8.7 Unloading of Freight by you

You are responsible for unloading Freight if:

- (a) the Freight Confirmation or the Consignment Note specifically states "owner to unload" or words to that effect; or
- (b) the Freight is consigned to an unattended terminal or is placed in a private siding.

4.8.8 Unloading of Freight by us

We may, at your risk and expense, unload any Vehicle which is awaiting collection of Freight or for which you are responsible for unloading if:

- (a) we require the Vehicle for use in our continuing operations; or

- (b) the Vehicle has been on hand for more than 24 hours from the time that the Freight was available for collection or unloading, as the case may be.

4.8.9 Freight Confirmation for Freight

Neither you nor anyone under your direction or control may load Freight on any Vehicle without a Freight Confirmation being issued to you in relation to such Freight. Without limiting clause 4.4.3, we may inspect a Vehicle at any time to ensure that a Freight Confirmation or a Consignment Note has been completed in respect of the Freight contained in the Vehicle. Any Freight in respect of which a Freight Confirmation or a Consignment Note has not been completed will be charged at Freight Rates.

4.9 STORAGE AND DEMURRAGE

4.9.1 Storage

Without prejudice to our rights under clause 4.7.2 or 4.10.4, we may store your Freight and charge you applicable Freight Rates for unloading and storage if:

- (a) we are unable (due to circumstances beyond our control) to deliver the Freight as required in terms of the Contract; or
- (b) you have not collected it within 8 Working Hours of the time at which it is available for collection.

4.9.2 Terms applying to storage

Where we store Freight on your behalf, whether by agreement or under clause 4.9.1:

- (a) you must collect the Freight within 8 Working Hours of such Freight being available for collection from our storage facility;
- (b) we make no guarantees as to the storage conditions and, to the maximum extent allowed by law, all responsibility or liability expressly or impliedly imposed on us in respect of such storage is excluded; and
- (c) you must indemnify us against any loss or damage we suffer as a direct or indirect result of the transportation to storage and storage.

4.9.3 Demurrage

Without limiting clause 4.10.4, we may charge demurrage on any Vehicle that is not loaded or unloaded by you within 8 Working Hours of:

- (a) the Vehicle being delivered to you; or
- (b) the Vehicle being available to be loaded or unloaded.

4.10 GENERAL

4.10.1 Delays, deviations and changes to services

We will endeavour to deliver Freight that is correctly addressed to addresses within our delivery network within our delivery target. However, we do not guarantee delivery within these targets. We may substitute carriers or forms of transport, change departure times, cancel or otherwise alter the Freight Services without notice.

4.10.2 Actual Carriers

Where we use an Actual Carrier, your Freight is carried subject to the Actual Carrier's conditions of carriage, provided that, if there is a conflict between the Actual Carrier's conditions of carriage and the Contract, the Contract will prevail.

4.10.3 No liability for errors, omissions or representations

We are not liable for errors or omissions in publications or schedules or for statements or representations made by our employees, contractors, agents or representatives as to any nature of the Freight Services.

4.10.4 Sale of Freight

Without limiting clauses 4.9.1, 4.9.2 and 4.9.3, we may sell your Freight on such terms and conditions as we see fit and without notice to you, if you:

- (a) fail to collect it by the time required under the Contract; or
- (b) fail to pay the Freight Rates or any other moneys owing by you to us within 7 days of such payment being due.

The proceeds of sale will be applied towards the cost of sale and to repay any moneys owing by you to us. Any balance will be paid to you.

4.10.5 Collection/disclosure of information

You authorise us to collect any information we consider relevant to assessing your creditworthiness or financial position. You also authorise us to use any information we obtain in relation to providing services to you for any purpose associated with our operations (including collections of any charges under the Contract) or marketing. Any information we obtain may be disclosed to our subsidiaries, contractors, Actual Carriers or agents.

4.10.6 Force Majeure

To the extent allowed by law, we are not liable for loss or damage to any Freight, or failure to perform any contracted services, as a result of an event outside our reasonable control, including war, strikes, lock-outs, flood, fire, earthquakes or mechanical breakdown, and we may terminate the Contract upon the occurrence of such an event.

4.10.7 Termination

We may terminate the Contract at any time if you:

- (a) are, become, or are deemed to be, insolvent or bankrupt;
- (b) make an assignment for the benefit of, or enters into or makes any arrangement or composition with, your creditors generally;
- (c) go into receivership or have a receiver, liquidator, trustee and manager (or either of them) (including a statutory manager) appointed in respect of all or any of your property;
- (d) are subject to any resolution passed, or any proceeding commenced, for your dissolution; or

- (e) breach or failure to properly or promptly perform any of your obligations under the Contract.

4.10.8 Effect of termination by us

- (a) If we terminate the Contract for any reason, you must collect Freight by the time and from the location we require by notice to you.
- (b) We may allocate capacity in our network to carriage of your Freight. If we terminate the Contract and we do not source alternative freight to fill the capacity we had allocated for your Freight, without prejudice to any other right, power or remedy, you are liable for the costs and expenses arising from that unused capacity.
- (c) The termination of the Contract by us is without prejudice to any other right, power or remedy under the Contract, at law, or otherwise.

4.10.9 Subcontractors

You agree that we may provide some or all of the Freight Services through one or more subcontractors.

4.10.10 Promotions

You consent to us collecting, holding and using information about you for our business purposes and contacting you from time to time about our products or services that we believe may be of interest to you by email or through other contact details.