

## SECTION 4 GENERAL CONDITIONS OF CARRIAGE

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### 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;

**“Collection Date”** – Means the day on which we notify you that Freight is available for collection;

**“Conditions”** – means the KiwiRail General Conditions of carriage, as amended from time to time;

**“Consignment Note”** – means the KiwiRail Freight Consignment Note or any other document (including in electronic form) containing similar information, satisfactory to us, which relates to the carriage of Freight;

**“Contract”** – means any written agreement between you and us which is negotiated before the carriage of the Freight to which it relates and which sets out the terms upon which the KiwiRail services are provided to you;

**Dangerous Goods:** - means any substance which, if discharged, may impair human, plant or animal life, or may adversely affect the environment and includes, without limitation, any substance with one or more of the following properties;

- (a) Explosiveness or flammability;
- (b) Corrosiveness;
- (c) A capacity to oxidise;
- (d) Toxicity;
- (e) Radioactivity;

**“Delivery Date”** – means the date on which the Freight is delivered to the delivery address specified in the Consignment Note or is otherwise delivered to you;

**“Freight”** – means “goods” as defined in the Act;

**“Freight Handling Code”** – means the Freight Handling Code (a copy of which can be reviewed on request) issued by us, as amended from time to time;

**“Freight Payer”** – means:

- (a) the person who has agreed to pay the Freight Rates and other charges, or who has been allocated the Freight Payer Code set out in the Consignment Note; or
- (b) if there is no such person, the Sender;

**“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, the KiwiRail rates applicable at the time we accept the Freight for carriage;

**“KiwiRail”** – means our freight service trading through the KiwiRail brand;

**“KiwiRail Rates”** – means the rates or charges charged by us for KiwiRail services, whether those rates are published or not;

**“Person”** – includes a body of persons, whether incorporated or not;

**“Receiver”** – means the person named on the Consignment Note to whom the Freight is to be consigned and, in the absence of a named person, means the person to whom the Sender intends to consign the Freight and includes that’s person’s agent;

**“Sender”** – means the person named on the Consignment Note as the Sender and, in the absence of a named person, means the person who sends the Freight or Consignment Note to us for carriage and includes that’s person’s agent;

**“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 Limited, our actual agents and where applicable, any Actual Carrier;

**“Working Day”** – means any day between 0800 hours and 1700 hours which is not a Saturday, Sunday or public holiday under the Holidays Act 1981;

**“Working Hour”** – means any hour during the Working Day;

**“You”** and **“Your”** – refer to our customers and includes the Sender, Receiver and Freight Payer or any one or more of those persons, as applicable;

#### **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.

#### **4.1.3 Governing Law**

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

### **4.2 APPLICATION**

#### **4.2.1 Priority of terms and conditions**

These Conditions apply to all KiwiRail services. In the case of conflict, the terms and conditions applicable to the carriage of Freight have the following order of priority (unless otherwise expressly stated in these Conditions):

- (a) Any Contract with us;
- (b) The Consignment Note;
- (c) Other written guidelines issued by us concerning the carriage of Freight or the operation of any KiwiRail service;
- (d) These Conditions.

#### **4.2.2 Overriding Law**

If a provision contained or referred to in these Conditions is in conflict with any law, then to the extent that the law can be waived or avoided by these Conditions, it will be. The invalidity of any one term does not invalidate any other provision contained in these Conditions.

#### **4.2.3 Business Customers**

Where you are using a KiwiRail service for business purposes you acknowledge that none of the rights or remedies provided under the Consumer Guarantees Act 1993 will apply.

#### **4.2.4 No waiver**

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

#### **4.2.4 Amendments to these Conditions**

We may amend these Conditions from time to time without notice. The Conditions applicable to the carriage of Freight are the Conditions current at the time at which the Freight is accepted for Carriage.

### **4.3 RATES AND CHARGES**

#### **4.3.1 Payment of Freight Rates**

The Freight Payer will be responsible for paying the Freight Rates and all other charges in respect of any KiwiRail service.

#### **4.3.2 Freight Rates**

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

#### **4.3.3 Goods and Services Tax**

Freight Rates do not include goods and services tax unless expressly stated to do so. Goods and services tax is payable in addition to any applicable Freight Rate.

#### **4.3.4 Other taxes and Government charges**

Any tax or similar charge imposed by government, or by any regional or other authority in respect of, or incidental to, your use of any KiwiRail Service is payable by you.

#### **4.3.5 Payment**

Payment for KiwiRail 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 5 Working Days of the date of invoice.

#### **4.3.6 Sender is primarily liable for payment**

The Sender remains liable for the payment of all Freight Rates and other charges incurred until the Freight Payer pays us in full.

#### **4.3.7 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. 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.

#### **4.3.8 Weighing and Measuring of Freight**

We reserve the right to check-weigh and check-measure your Freight and alter any consignment note accordingly. Any check-weighing or check-measuring undertaken by us will be at your expense (including any increase in the applicable Freight Rate) 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.

We do not accept responsibility for, or guarantee, our weighing or measurement for any purposes not related to the carriage of Freight by us.

#### **4.3.9 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 by you.

#### **4.3.10 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.

#### **4.3.11 Quotes**

Any written quote which we give in respect of the carriage of Freight will remain open for a period of 30 days. We will not be bound by quotes unless they are 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 receive a Consignment Note containing all of the information we require; or
- (b) The time we take possession of all Freight referred to in the Consignment Note.

#### **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 or affect any warranty given by you in respect of the Freight by reason of either having inspected or having failed to inspect the Freight.

### **4.5 OUR LIABILITY TO YOU**

#### **4.5.1 Liability**

Subject to the various limitations set out in this clause 5, our liability for carriage of your Freight starts at the time we accept your Freight for carriage and ceases at the time we deliver the Freight to you or notify you that the Freight is ready for collection.

#### 4.5.2 **Limitation of Liability**

We are not liable (whether in contract, tort - including negligence, or otherwise) for:

- (a) Any amount exceeding the lesser of:
  - (i) Proven damages; or
  - (ii) The sum provided in section 15(1) of the Act;
- (b) Any loss or damage to the extent that such loss or damage:
  - (i) Arises directly or indirectly from, or is contributed to by, incorrect information provided by you or your failure to comply with these Conditions or any other applicable terms and conditions;
  - (ii) Arises 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 or any indirect or consequential loss or damage of any kind including, without limitation, any loss or damage of the kinds referred to in subsections 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 with your failure to comply with any such laws or regulations.

#### 4.5.5 **Liability in respect of other services**

Where we provide any service to you other than the carriage of Freight, including, without limitation, 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 during the provision of that service is limited to the amount charged by us for providing the service and is further limited by clauses 4.5.2 and 4.5.3.

#### 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) Subject to subclause (b) below, 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 30 days after the Delivery Date or Collection Date (as applicable) or within 60 days of the date of despatch, whichever is the earlier.
- (b) In the case of Temperature Controlled Freight, 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 Collection Date (as applicable) or within 14 days of the date of despatch, whichever is the earlier.
- (c) Notices pursuant to subclauses (a) and (b) above must be given in writing to the KiwiRail branch responsible for consignment 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.
- (d) 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.

#### 4.5.6 **Freight Handling Code**

You must comply with the Freight Handling Code at all times. Notwithstanding anything else contained in these Conditions, 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 current provisions of the Freight Handling Code.

#### 4.5.7 **Employees, representatives and agents**

The exclusions and limitations of liability set out in this Section 4.5 and the indemnity set out in Section 4.6 below also apply to, and are for the benefit of, our employees, representatives and agents together with any Actual Carrier and their employees, 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.

### 4.6 **YOUR LIABILITY TO US**

#### 4.6.1 **Damage to equipment**

You are liable 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, representatives or agents or any Actual Carrier or their employees, representatives or agents, where such loss or damage is caused directly or indirectly by any act or omission by you (regardless of whether you are negligent or at fault or not) or any failure by you to comply with these Conditions.

#### 4.6.2 **Return of KiwiRail equipment**

If you use any of our equipment or property you must return it on request or immediately following its use, 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), claims and expenses suffered or incurred by us which are directly or indirectly caused by any negligence on your part and/or any failure by you to comply with these Conditions or any other applicable terms and conditions.

### 4.7 **SPECIAL FREIGHT**

The terms and conditions contained in this Section 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 is carried subject to the following:

- (a) You must supply us with any declaration or other documentation required by us or by law in relation to Dangerous Goods;
- (b) Dangerous Goods must be packed, labelled and loaded in accordance with all laws and regulations applicable to the carriage of Dangerous Goods, and in accordance with any guidelines or code of practice specified by us.

#### 4.7.2 **Removal of Dangerous Goods**

Dangerous Goods, other than Class 1 explosives designated under the HSNO Act, must be collected by you within 18 hours of being notified of its availability for collection. Explosives designated as Class 1 explosives under the HSNO Act must be collected by you within 1 hour of being notified of its availability for collection. Dangerous Goods not so collected will be at your risk and responsibility. We may, at your risk and expense, dispose of any Dangerous Goods left on our premises.

#### 4.7.3 **Animals**

Animals are carried subject to the following:

- (a) We do not accept any liability for loss of, or sickness or injury to, any animal;
- (b) You must provide us with all necessary permits or documents required by law or requested by us in relation to the carriage of any animal;
- (c) We do not accept any responsibility for feeding, watering or otherwise tending to any animal;
- (d) You must collect any animal within two hours of being notified of its availability for collection.

#### 4.7.4 **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;
- (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**

When you send Freight with us you warrant that:

- (a) It complies with all laws and regulations relating to the nature, packaging, labelling, storage or carriage of that Freight;
- (b) It complies with the requirements of the Freight Handling Code;
- (c) The Freight 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 of these Conditions, where you load the Freight, we may charge for reloading, adjusting and additional carriage at KiwiRail 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 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 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, without limitation, any costs we incur as a result of the packaging of the Freight not conforming to the Receiver's requirements.

#### 4.8.5 Loading / Unloading of Heavy Freight

You must load and unload Freight at your own risk and expense 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" pursuant to the carriage of Goods Act 1979.

#### 4.8.7 Unloading of Freight by you

You are responsible for unloading Freight if:

- (a) The Contract or 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 Consignment Note for Freight

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

### 4.9 STORAGE AND DEMURRAGE

#### 4.9.1 Storage

We may store your Freight and charge you applicable KiwiRail Rates for unloading and storage if:

- (a) We are unable (due to circumstances beyond our control) to deliver the Freight in terms of the Consignment Note or Contract; or
- (b) You have not collected it within 8 Working Hours of the time at which we notify you that 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

- (a) You must collect the Freight within 8 Working Hours of receiving notice from us to collect it;
- (b) The Freight is stored at your risk and expense in all respects. To the maximum extent allowed by law all responsibility or liability expressly or impliedly imposed on us in respect of such storage is excluded;
- (c) You must indemnify us against any loss or damage we suffer as a direct or indirect result of the storage.

#### 4.9.2 **Demurrage**

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) Us notifying you that the Vehicle is available for collection.

### 4.10 **GENERAL**

#### 4.10.1 **Delays, deviations and changes to services**

We may substitute carriers or forms of transport, change departure times, cancel or otherwise alter any KiwiRail service without notice. We do not guarantee that Freight will arrive at its destination, or at any connecting point, at any particular time.

#### 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 these Conditions or any other terms and conditions applicable to the carriage by us, these Conditions or the other applicable terms and conditions, as the case may be, 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, agents or representatives as to any nature of any KiwiRail service.

#### 4.10.4 **Sale of Freight**

We may sell your Freight without notice to you if you:

- (a) Fail to collect it by the time required under these Conditions; 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 or marketing. Any information we obtain may be disclosed to our subsidiaries.

#### 4.10.5 **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, without limitation, war, strikes, lock-outs, flood, fire or earthquakes.