

ARA Group NZ Ltd trading as Metalbilt

Standard Terms and Conditions of Sale/Supply of Goods

The following terms and conditions may be subject to consumer protection laws, including the *Consumer Guarantees Act 1993*, *Fair Trading Act 1986* and other applicable New Zealand consumer protection laws and regulations (**Consumer Laws**). Nothing in these terms and conditions is intended to exclude, restrict or modify any rights available to the Customer under the Consumer Laws which may not legally be excluded, restricted or modified, in the circumstances that such Consumer Laws are applicable and available to the Customer.

1. Agreement

- 1.1 The terms and conditions set out herein apply to and form part of the Agreement between the Supplier and the Customer. They supersede any previously issued terms and conditions of sale and/or supply, including any such terms and conditions issued to the Supplier by the Customer which shall be deemed to have been rejected by the Supplier and of no binding effect.
- 1.2 Acceptance by the Supplier to provide the Goods described or referred to in any Purchase Order issued to the Supplier from the Customer constitutes the formation of the Agreement and is expressly subject to and conditional upon the terms and conditions set out herein.
- 1.3 Any Purchase Order, statement of intent to procure any Goods or any direction from the Customer to the Supplier to procure, manufacture, ship or supply Goods shall constitute acceptance of the terms and conditions contained in this Agreement by the Customer and shall be taken as the Customer's representation that it is solvent. For the avoidance of doubt, if the Customer has not issued the Supplier a Purchase Order but otherwise does any of the things captured by this clause 1.3, such action will for the purposes of this Agreement be deemed to amount to a Purchase Order and shall be captured by any subsequent reference in this Agreement to a "Purchase Order".
- 1.4 Any alteration, amendment or waiver of this Agreement by the Customer shall not be effective or binding on the Supplier except where the Supplier's duly authorised representative consents in writing to the alteration, amendment or waiver.
- 1.5 The Customer acknowledges and agrees the Supplier is not bound by any representations, statements, conditions or agreements made by the Supplier's personnel other than the Supplier's duly authorised representatives (which, for the avoidance of doubt, shall be taken to be limited to the Supplier's directors and company officers).

2. Specification

- 2.1 The Goods shall be supplied in a timely manner in accordance with the Agreement, and the Supplier shall comply with any specifications set out in the Purchase Order to the extent the Supplier is able to accommodate such specifications. Where the Purchase Order contains specifications which are ambiguous or unclear, the Supplier will notify the Customer and the specifications shall not apply unless and until such time as the Customer provides or clarifies the specifications and brings such to the Supplier's attention prior to fulfilment of the Purchase Order. No other specifications shall apply or be adhered to where such are not clearly and unambiguously set out in the Purchase Order.

3. Price

- 3.1 The Customer must pay to the Supplier the Price for the Goods at the prevailing rates of the Supplier at the time the Purchase Order is placed, or in the amount specified

in any Quotation provided by the Supplier plus delivery costs (if any). To the extent of any discrepancy or conflict, the Price quoted by the Supplier in a Quotation to the Customer (or, in the absence of a Quotation, the Price stipulated in the Supplier's tax invoice) shall prevail above all else.

- 3.2 All Quotations issued by the Supplier to the Customer:

- (a) shall be valid for a period of thirty (30) days following which the Quotation shall lapse unless the Supplier otherwise agrees at its own discretion to nonetheless provide the quoted at the Price noted in the lapsed Quotation; and
- (b) shall be based on the costs of labour, materials and statutory obligations applicable at the date of the Quotation (or in the absence of a Quotation, the date of issuance of a tax invoice by the Supplier). Any variations in the rates or obligations incurred by the Supplier shall be payable by the Customer.

- 3.3 Any variation to a Purchase Order raised after the Supplier has issued its Quotation (whether in respect of additional works, change in specifications, change in timetabling of schedules or otherwise) shall entitle the Supplier to amend the Price for such Purchase Order accordingly in respect of its costs in complying with the varied Purchase Order.

- 3.4 Any increase in the cost of delivery of the between the date of the Purchase Order and the date of delivery shall be notified to the Customer (if applicable) and shall be the responsibility of the Customer.

- 3.5 The Supplier may change the Price at any time. Any Price changes will only take effect on subsequent Purchase Orders placed by the Customers after the Price change, which will not impact any Purchase Orders that as at the date of the Price change are on foot but not yet completed.

- 3.6 If the Supplier has provided the Customer with a Quotation in respect of multiple components of work or different items and the Customer subsequently elects to instruct the Supplier to proceed with only a portion of such work or items quoted, the Supplier reserves its rights to issue a revised Quotation which reasonably increases its Price so as to render the transaction commercially viable.

- 3.7 The Supplier shall be entitled to charge its reasonable additional costs and fees (including as set out in clauses 6.2 and 6.3) for all delays caused as a result of the Supplier obeying any instructions given by the Customer or the Customer not fulfilling the Customer's obligations under the Agreement.

4. GST and Other Taxes

- 4.1 The Price is exclusive of GST. The Customer must pay the Supplier an additional amount for any GST payable in respect of any taxable supply made under or in connection with the Agreement, provided the Supplier provides the Customer with a tax invoice in respect of that taxable supply.

- 4.2 If there is an adjustment event in relation to a taxable supply:
- (a) the Supplier must refund to the Customer the amount by which the GST paid by the Customer (pursuant to clause 4.1) exceeds the adjusted GST on the taxable supply; or
 - (b) the Customer must pay to the Supplier the amount by which the adjusted GST on the supply exceeds the amount of GST paid (pursuant to clause 4.1).
- 4.3 Any other taxes (excluding income taxes), duties, fees, charges or assessments of any nature levied by any government authority in connection with the Agreement shall be paid directly by the Customer to the government authority concerned. If the Supplier is required by law or otherwise to pay such levies, fines, penalties or assessments in the first instance, or as a result of Customer's failure to comply with any applicable laws or regulations governing the payment of such levies, fines, penalties or assessments by the Customer, the amount of any payments so made by the Supplier shall be reimbursed by the Customer to the Supplier upon receipt of the Supplier's tax invoice for such costs.

5. Property and Risk

- 5.1 All risk and liability for Goods will transfer to the Customer upon delivery of the Goods to the Customer or to any third party acting on its behalf.
- 5.2 Notwithstanding the above, the Supplier shall retain title in the Goods and shall be the sole and absolute owner of the Goods until the Price for the Goods has been received in full by the Supplier. If the Customer is in default under this Agreement, the Supplier shall be entitled, in addition to the rights conferred by clause 5.3(b), to retake possession of all Goods in the possession of the Customer which have been supplied by the Supplier and not paid for, and which are sufficient to clear any outstanding indebtedness by the Customer to the Supplier under the terms of this Agreement.
- 5.3 Until the Supplier has received payment in full from the Customer of the Price for all Goods supplied to it by the Supplier:
- (a) the Customer shall be bailee of the Goods for the Supplier and shall store them at its premises separately from its own goods and items or those of any other person, and shall store them in a manner enabling them to be readily identifiable as Goods of the Supplier;
 - (b) the Customer grants the Supplier an irrevocable licence to enter the Customer's premises and retrieve the Goods;
 - (c) keep the Goods fully insured against risks that are usual or common to insure against in a business of a similar nature to that of the Customer in accordance with clause 9.1; and
 - (d) the Customer shall not sell or dispose of any of the Goods or any interest in the Goods without the prior written consent of the Supplier.
- 5.4 Where the Supplier consents in writing to the sale or disposal of Goods, or where any sale or disposal of Goods is made in breach of clause 5.3, notwithstanding such consent or breach:

- (a) the Customer shall inform any person to whom it proposes to sell or dispose of the Goods to (including any interest in the Goods) (**Acquirer**) of the Supplier's interest in the Goods;
- (b) the Customer shall ensure that the terms of the sale or disposal of Goods to the Acquirer includes a term which is identical in substance to clause 5 of this Agreement;
- (c) notwithstanding that the payment of the Price for the Goods would not otherwise have been due by the Customer, the Customer shall be obliged to pay the Price for the Goods to the Supplier as soon as it receives payment from the Acquirer;
- (d) the Customer shall hold all its rights against the Acquirer on trust for the Supplier and, to the extent necessary to discharge all debts owing to the Supplier in respect of the supply of Goods or other Goods only, any proceeds it receives;
- (e) the Customer agrees that the Supplier shall be entitled to trace all and any proceeds arising from any sale or disposal of the Goods until the Customer pays the Price for the Goods to the Supplier (including for all other Goods supplied by the Supplier); and
- (f) the Customer shall, at the Supplier's request, assign its claims against the Acquirer and agrees irrevocably to appoint the Supplier and each of its officers as its attorney to give effect to and complete that assignment.

- 5.5 Where Goods have become Mixed Goods, the Customer agrees with the Supplier:

- (a) that the ownership of the Mixed Goods immediately passes to the Supplier, to the extent necessary to repay all moneys owing to the Supplier (but to no greater extent); and
- (b) until payment of all sums owing to the Supplier, whether under this Agreement or any other contract, the Customer shall hold the Goods as a fiduciary for the Supplier.

- 5.6 For the avoidance of doubt, subject to the PPSA, the ownership of Mixed Goods passes to the Supplier at the beginning of the single operation or event by which the Goods are converted, mixed, commingled or become part of Mixed Goods.

- 5.7 Where the Customer has not paid the Supplier in the manner required by this Agreement:

- (a) the Customer agrees with the Supplier to keep Mixed Goods as a fiduciary for the Supplier and, unless otherwise required by the Supplier, to store Mixed Goods in a manner that clearly shows the ownership of the Supplier; and
- (b) the Customer grants the Supplier a security interest in the Mixed Goods as security for payment of the Goods.

6. Delivery

- 6.1 Any dates for delivery and/or installation of Goods as advised by the Supplier are approximate and are based upon prompt and clear access to the area and location to which the Goods are to be delivered to and/or installed at.

- 6.2 Where the Customer has failed to properly prepare for the Supplier's delivery or installation of Goods, including by way of not providing those things required by clause 6.1 to be given to the Supplier, the Supplier reserves its rights to charge the Customer an attempted delivery fee (representative of the Supplier's reasonable costs of having attempted delivery).
- 6.3 If the Customer fails to take delivery of Goods (including but not limited to failing to prepare for delivery), in addition to the Supplier's rights under clause 6.2, the Supplier may temporarily store the Goods until such time as the Customer accepts or prepares for delivery of Goods (**Storage Period**). In such circumstances, the Customer shall be liable to the Supplier for the Supplier's reasonable costs of storing the Goods for the duration of the Storage Period.
- 6.4 All delivery costs for Goods shall be in addition to the Price unless expressly stated otherwise by the Supplier.
- 6.5 The Supplier shall not be liable for any delay in delivery or installation of Goods where the delay is caused by a Force Majeure Event or a delay is caused by a third party and the date of delivery and/or installation shall be postponed to a subsequent date and time mutually agreed between the Parties. If a Force Majeure Event or delay caused by a third party can reasonably be expected to significantly delay delivery and/or installation of Goods by thirty (30) days or more (**Extended Delay**), the Supplier shall, as a courtesy, provide the Customer with written notice of the Extended Delay as soon as is reasonably practicable upon being made aware of such occurrence.
- 6.6 The Customer shall not be entitled to a reduction in Price for Goods subject to delays caused by a Force Majeure Event or by a third party (including in respect of any Extended Delay), except in the circumstances where the Supplier, as a gesture of goodwill, offers to reduce the Price for the delayed Goods.
- 6.7 The Supplier shall not be liable to the Customer for any Loss or Consequential Loss (whether liquidated, general or otherwise) incurred by the Customer as a result of or as associated with a delay in the delivery or installation of Goods resulting from the acts, events or circumstances captured by clauses 6.2, 6.3 or 6.5.
- 6.8 All deliveries and installations of Goods shall take place within the Supplier's ordinary business hours unless the Supplier expressly agrees otherwise.
- 7. Payment**
- 7.1 The Supplier may, at its discretion, require the Customer to place a deposit or make pre-payment of the Price up to the value of 50% of the total Price payable (**Deposit**) prior to supply of Goods, and no later than ten (10) business days following the date on which the Supplier requests the Deposit. The Deposit shall be used towards the value of the Price owing by the Customer to the Supplier.
- 7.2 If the Supplier requests a Deposit and the Customer does not provide such within ten (10) business days of the Supplier's request for the Deposit, the Supplier reserves its rights to delay the supply until such time that the Deposit is received. Where the Supplier exercises the right to delay commencement of supply of Goods due to the Customer's delay in providing the Deposit, the Supplier shall not be liable to the Customer for any Loss or Consequential Loss in respect of such delay.
- 7.3 Unless otherwise specified by the Supplier in writing, payment of the Price is to be made by the Customer no later than thirty (30) days from the date the Supplier issues the Customer a validly issued tax invoice. For the purposes of this clause 7.3, a tax invoice will be considered to be validly issued where the invoice includes:
- (a) the Supplier's name and New Zealand business number or company number;
 - (b) a description of the Goods supplied; and
 - (c) the amount of any applicable GST noted.
- 7.4 All payments made by the Customer to the Supplier must be made by way of cleared funds by cash, cheque, bank transfer, credit card, debit card, or by any other method as agreed to by the Supplier. The Customer acknowledges that any payment made by way of credit card may incur a surcharge.
- 7.5 In addition to the right in clause 15.2(b)(iii), if the Customer fails to make payment of a tax invoice within thirty (30) days of the date the Supplier issued the tax invoice, the Supplier shall, be entitled to:
- (a) charge the Customer interest on any amounts outstanding at a rate of 10% per annum, calculated on a pro rata basis daily for each day the applicable tax invoice remains unpaid; and
 - (b) suspend the supply or cease installation of any Goods until such time as payment is received from the Customer.
- 7.6 In the event of bankruptcy or insolvency of the Customer, or where any proceeding is brought against the Customer, whether voluntarily or involuntarily under bankruptcy or insolvency laws, the Supplier shall be entitled to cancel any Purchase Order outstanding at any time during the period allowed for filing claims against the Customer, and the Customer will reimburse the Supplier for the reasonable costs incurred by the Supplier in relation to the cancelled Purchase Order.
- 7.7 The Supplier, at its discretion, may retain possession of Goods ordered but not yet delivered or installed, or any Goods of the Customer which it repaired, modified, inspected, maintained or serviced under this Agreement until the Price for such Goods is paid in full. If the Price is not paid within sixty (60) days from the date of the relevant tax invoice, the Supplier may, upon not less than seven (7) days' written notice by registered mail or email to the Customer, at the Customer's last known address or email address (as applicable), sell the Goods at a public or private sale and apply the net proceeds to the outstanding amounts owing by the Customer.
- 7.8 The Customer indemnifies the Supplier from and against all Loss (including Consequential Loss) incurred by the Supplier in pursuing any debt owed to it by the Customer, including in respect of exercising its rights pursuant to clauses 7.6 and 7.7.
- 8 Security**
- 8.1 The Customer acknowledges and agrees that this Agreement constitutes a security agreement for the purposes of section 36 of the PPSA which is registrable on the Personal Property Securities Register (**Register**) and consents to the Supplier creating and maintaining a registration on the Register in any required form, in relation to any security interest

(including a "security interest" as defined by the PPSA) contemplated or created by this Agreement.

- 8.2 The Customer agrees to sign any necessary documents and provide all reasonable assistance and information to facilitate the registration and maintenance of a security interest on the Register if required by the Supplier. The Supplier reserves the right to register a financing statement or financing change statement in respect of any security interest and the Customer waives the right to receive notice of a verification statement in relation to any registration of a security interest on the Register by the Supplier in respect of any Goods supplied.
- 8.3 The Customer undertakes to do any and all acts that are reasonably required by the Supplier so as to:
- (a) allow the Supplier to create and maintain a perfected security interest (including a purchase money security interest) pursuant to the PPSA in respect of any Goods supplied and any and all proceeds of those Goods;
 - (b) allow the Supplier to register a financing statement or financing change statement;
 - (c) ensure that the Supplier maintains its secured position under the PPSA;
 - (d) not register a financing statement or financing change statement without the Supplier's prior written consent; and
 - (e) not register or commit to the register of a financial statement or financing change statement in respect of the Goods, in favour of a third party, without the Supplier's prior written consent.
- 8.4 The Customer agrees that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply on the enforcement by the Supplier of any security interest created or provided for by this Agreement. The Customer waives any rights the Customer may have under sections 116, 120(2), 121, 125, 126, 127, 129, and 131 of the PPSA on such enforcement.
- 8.5 The Supplier may apply amounts received in connection with the sale of Goods to satisfy obligations secured by security interests contemplated or constituted by the Agreement, at the Supplier's absolute discretion.
- 8.6 Nothing in this Agreement will be construed as:
- (a) an Agreement to subordinate the security interest or the charge under this Agreement in favour of any person; or
 - (b) a consent by the Supplier to any other security interest attaching to (as "attach" is used in the context of the PPSA), or any other security subsisting over any Goods.
- 8.7 Despite anything to the contrary contained in this Agreement or any other rights which the Supplier may have howsoever, to the extent permitted by law:
- (a) the Customer charges all of its estate and interest in land, personal property or other property in favour of the Supplier to secure all monetary and other obligations under the Agreement;
 - (b) the Customer acknowledges and agrees that the Supplier is entitled to register securities for all

purposes of clause 8 (including an absolute caveat) with any applicable security registries, providing that those registered securities must be withdrawn once all payments and other monetary obligations payable under the Agreement have been met; and

- (c) the Customer irrevocably appoints the Supplier as the Customer's true and lawful attorney to perform all necessary acts to give effect to the provisions of clause 8.

9 Insurance

- 9.1 The Supplier shall, until delivery of the Goods, at its own cost and in a form reasonably acceptable to the Customer, insure the Goods against loss or damage.
- 9.2 For the duration of the Agreement, the Supplier shall maintain:
- (a) public liability insurance for a sum of not less than \$20,000,000 for any one occurrence and unlimited during the period of insurance;
 - (b) products liability insurance for a sum of not less than \$20,000,000 for any one occurrence and in the aggregate;
 - (c) motor vehicle third party property insurance for a sum of not less than \$20,000,000 for any one claim and unlimited during the period of insurance in respect of all motor vehicles used by the Supplier and its employees in connection with the supply and/or installation of Goods; and
 - (d) motor vehicle third party liability insurance, as required by law.
- 9.3 The Supplier shall, at the Customer's request, provide evidence of the above insurances by way of supplying certificates of currency.
- 9.4 If the Supplier engages any subcontractors to supply or install Goods, the Supplier shall ensure the subcontractors procure the insurances set out above at clause 9.2 to the extent appropriate and relevant to the subcontractor's engagement.
- ## 10 Warranty
- 10.1 The Customer acknowledges and agrees that (to the extent applicable):
- (a) the Customer has determined that the Goods are fit for the purpose for which they are required;
 - (b) the Customer has not relied on the skill and judgment of the Supplier in selecting the Goods;
 - (c) the Customer has checked the Goods for suitability, functionality, completeness, and compliance with any applicable specifications; and
 - (d) the Supplier will not be liable for the provision of goods other than in respect of those Goods specified on any Purchase Order, Quotation or tax invoice pursuant to which the Supplier has supplied the Goods to the Customer.
- 10.2 In addition to the Customer's rights under the Consumer Laws (if applicable), the Supplier warrants to the Customer that the Goods to be provided under the Agreement will match the description given of them (as

applicable), be free from material defects, of acceptable quality, and fit for purpose (**Warranty**).

- 10.3 The Warranty shall apply only to defects appearing and reported by the Customer to the Supplier within twelve (12) months from the date of delivery of Goods, or, where Goods are installed by the Supplier, within twelve (12) months from the date of installation of Goods (**Warranty Period**), following which the Customer will be deemed to have accepted the Goods, subject to any rights the Customer may have under Consumer Laws.
- 10.4 If the Supplier breaches the Warranty and the Goods are found to be defective, subject to the Customer notifying the Supplier of the breached warranty or defect in accordance with clause 10.3, the Supplier's liability is strictly limited to performing one or more of the following remedies at its sole discretion (as is reasonable in the circumstances), within a reasonable period of being notified of the applicable defect:
- (a) repair the Goods;
 - (b) replace the Goods; or
 - (c) refund the value of the Goods,
- provided that, where the Customer is a "consumer" pursuant to the Consumer Laws, in the event the defect in the Goods amounts to a "serious fault" and the remedies set out above are not suitable for the purposes of making good the serious fault, or where the Supplier fails to remedy the defect within a reasonable period of being notified of the defect by the Customer, the Supplier shall:
- (d) refund the Customer for the cost of the Goods or compensate the Customer for the reduced value of the Goods; and
 - (e) compensate the Customer for any reasonably foreseeable Loss directly resulting from the serious fault,
- and the Customer shall be entitled to terminate this Agreement, at its discretion, by way of written notice to the Supplier.
- 10.5 To the maximum extent permitted by applicable law, the liability of the Supplier for any Loss incurred by the Customer as a result of the Warranty breach (whether the claim is based on contract, negligence or otherwise) will not, under any circumstance whatsoever exceed the actual cost of correcting the defect in the relevant Goods unless clauses 10.4(d) or (e) apply in respect of a serious fault. For the avoidance of doubt, the Supplier shall not be liable to the Customer in respect of any Consequential Loss arising out of or incurred by reason of a defect in the Goods.
- 10.6 To the extent permitted by law, any condition, term, guarantee or warranty which would otherwise be implied in the Agreement is hereby excluded.
- 10.7 For the purposes of clause 10, a "serious fault" means Goods which a reasonable consumer would not have requested or acquired had they known about the problem with the Goods, or where the Goods were:
- (a) significantly different from the sample or description (if a sample or description was provided);
 - (b) substantially unfit for their normal purpose and could not be easily fixed within a reasonable period of time;

- (c) substantially unfit for the specific purposes for which they were acquired for, if that purpose was made known to the Supplier at the time of the Purchase Order, and could not be easily fixed within a reasonable period of time; or
- (d) unsafe.

11 Change of Mind

- 11.1 The Supplier shall allow return of Goods for "change of mind" on the part of the Customer, providing that any returned Goods are:
- (a) received by the Supplier within thirty (30) days of the date the Goods were originally delivered to the Customer;
 - (b) returned in their original packaging with all original brochures, instruction manuals, tags, pamphlets and similar materials that were included with the Goods as at delivery; and
 - (c) new and unused, in good and resaleable condition, having not been used, improperly stored or handled.
- 11.2 The Supplier shall not accept returned Goods where:
- (a) the Goods do not conform with the return requirements set out in clause 11.1;
 - (b) the Goods were custom made for the Customer, or were otherwise specially ordered or non-standard;
 - (c) the Goods have been altered, amended, tampered with or destroyed;
 - (d) the Goods were installed (whether by the Supplier or a third party), in which instance their removal or uninstallation shall render them as being non-compliant with clause 11.1(c).
- 11.3 All costs associated with postage and delivery of Goods being returned to the Supplier shall be borne by the Customer. In the event a return is denied by the Supplier for any of the reasons set out in clause 11.2, the Customer may collect the Goods from the Supplier's premises at a mutually agreed date and time, or may otherwise request the Supplier to return deliver the Goods to the Customer at the Customer's expense.
- 11.4 Where Goods are returned and comply with the return requirements set out in clause 11.1, the Supplier shall issue the Customer a credit for the value of the returned Goods, less a re-stocking and handling fee equivalent to twenty per cent (20%) of the Price of the Goods. The Supplier may, at its discretion, refund the Customer in lieu of a credit, in which instance, the amount of the refund shall be equivalent to the amount which otherwise would have been credited to the Customer in accordance with this clause 11.4.

12 Limitation of Liability

- 12.1 The Supplier's liability for or under any dispute, demand, claim, action, suit or proceeding brought by or on behalf of the Customer in respect of this Agreement or matters associated with this Agreement, is strictly limited to the value of the portion of the Price allocable to the Goods which gave rise to such dispute, demand, claim, action, suit or proceeding, including in respect of any Loss arising out of or connected with this Agreement, or from the performance or breach thereof or from the design, manufacture, sale, delivery, resale,

installation, technical direction of installation, inspection, repair, test, modification, operation or use of things covered by or furnished under this Agreement, except in respect of liability pursuant to clauses 10.4(d) or (e).

12.2 The Supplier will not, under any circumstances whatsoever, be liable to the Customer for:

- (a) any Consequential Loss; or
- (b) any Loss incurred or any dispute, demand, claim, action, suit or proceeding brought by a third party against the Customer for Loss (including in respect of Consequential Loss), except to the extent the Loss arose by reason of the Supplier's negligence.

12.3 Notwithstanding clause 10, the Supplier does not give any Warranty with respect to and shall not be liable to the Customer for (without limitation):

- (a) fair wear and tear;
- (b) breaches of the Warranty not reported to the Supplier within the Warranty Period;
- (c) Goods which the Supplier recommended be serviced and/or maintained by the Customer, in respect of which, the failure, damage, or fault complained of by the Customer relates to inadequate servicing and/or maintenance and is not in itself a defect;
- (d) failures or damage in respect of the Goods due to misapplication, abuse, abnormal conditions of temperature, dirt or corrosive matter;
- (e) failures in respect of the Goods due to operation (either intentional, accidental or otherwise) above rated capacities or in an otherwise improper manner by the Customer;
- (f) Goods which have been in any way tampered with or altered by anyone other than an authorised representative of the Supplier;
- (g) Goods which have been installed by the Customer or a third party in a manner inconsistent with the Supplier's (or manufacturer's) installation instructions or operating manual (as applicable);
- (h) Goods which have been improperly stored or maintained;
- (i) defects in the design of Goods where such designs were not those of the Supplier or prepared by the Supplier;
- (j) Goods damaged in shipment or otherwise without fault of the Supplier; and
- (k) expenses incurred by the Customer in an attempt to repair or rework any alleged damage to Goods other than where incurred with the consent of the Supplier in accordance with clause 10.4.

12.4 The Customer agrees to indemnify the Supplier from and against:

- (a) any Loss arising during, as a result of, or in connection with the Supplier's supply of Goods, to the extent caused or contributed to by the act, omission, negligence or recklessness of the Customer, its employees, agents or contractors;
- (b) any Loss arising from or in connection with the act, omission, negligence or recklessness of the

Customer, the Customer's employees, agents and contractors; and

- (c) any Loss arising from or in connection with the act, omission, negligence or recklessness of the Customer, the Customer's employees, agents and contractors in respect of Goods which the Customer (or its employees, agents and contractors) misappropriated, misused, stored or handled in a way contrary to the Supplier's instructions or reasonably expected ordinary storage and use, or otherwise where due care and skill were not applied.

12.5 The Customer shall assume all risks and liabilities for and in respect of the provision of Goods and for injuries to or death of persons and damage to property arising as a result of the act, omission, negligence or recklessness of the Customer, its employees, agents and contractors, and the Customer indemnifies the Supplier from and against:

- (a) Loss of or damage to any Goods for which payment of the Price has not yet been made in full, whether by fire, theft, accident, seizure, confiscation or howsoever otherwise occurring whilst in the Customer's custody, possession or control; and
- (b) all other Loss howsoever arising or incurred, as a result of or in connection with the provision and/or installation of the Goods, except where such Loss arises or is incurred by reason of the Supplier's wilful, reckless or negligent act or omission

13 Materials Supplied by the Customer

13.1 Where specified in the Agreement, the Customer shall provide to the Supplier any patterns, designs, specifications, drawings, samples, technical information or otherwise as required (whether in electronic format or otherwise), or which the Customer has agreed in writing to provide to enable the Supplier to supply and/or install the Goods (**Materials**) and the Customer hereby warrants that the Materials will not infringe any intellectual property rights or other rights of any other person and the Customer agrees to indemnify the Supplier against any liability incurred by the Supplier, including any costs and expenses in the event of any claim being made that the manufacture or supply of Goods incorporating or using the Materials infringes any intellectual property rights or other rights of any other person.

13.2 All Materials and the Customer's Intellectual Property within such Materials (if any), remain the property of the Customer.

13.3 The Supplier will not use the Materials for any purpose other than to the extent required to supply the Goods to the Customer and the Customer hereby grants to the Supplier a royalty-free licence to use the Materials and the Customer's Intellectual Property within such Materials for this purpose.

14 Intellectual Property

14.1 Other than as agreed between the Parties:

- (a) the Supplier hereby grants to the Customer a perpetual, irrevocable, non-exclusive, royalty-free, non-transferable licence to use all Intellectual Property (where owned by the Supplier) which is used by the Supplier in connection with the supply and/or installation of Goods under the Agreement;

- (b) all Intellectual Property developed by the Supplier in connection with the supply and/or installation of Goods under the Agreement vests in the Supplier; and
- (c) the Customer agrees to enter into and/or execute any document reasonably required to give effect to the provisions of this clause 14.1.

14.2 The Supplier warrants that:

- (a) the supply and/or installation of Goods by the Supplier to the Customer and the licence granted by the Supplier pursuant to clause 14.1 do not infringe the Intellectual Property rights of any third party; and
- (b) the supply of Goods is not subject to any Intellectual Property rights of any third party that in any way restrict the rights of the Customer or its Customers to use or sell the same.

14.3 Notwithstanding clause 14.1 above, nothing in this Agreement shall be taken to have the effect of assigning the ownership of any pre-existing Intellectual Property rights the Supplier has in of its pre-existing material.

15 Termination, Cancellation and Returns

15.1 The Customer may cancel any Purchase Order prior to provision of the Goods under that Purchase Order by way of seven (7) days' written notice to the Supplier, subject to the Customer reimbursing the Supplier for any costs reasonably incurred by the Supplier in relation to fulfilling or otherwise preparing to fulfil the cancelled Purchase Order. In the event a Customer cancels a Purchase Order concerning custom-made Goods supplied or manufactured by the Supplier in accordance with the Customer's specifications, if the written notice to cancel the Purchase Order is received after the Supplier has begun fulfilling the Purchase Order, the Supplier reserves its rights to charge the Customer the full Price of the cancelled Purchase Order in respect of those Goods.

15.2 The Supplier may terminate the Agreement at any time:

- (a) for convenience by giving the Customer thirty (30) days' written notice to such effect (**Termination Notice**), in which case the Supplier will fulfil any Purchase Orders issued to the Supplier prior to the date of the Termination Notice, unless the Parties agree otherwise (such as where it is not possible to fulfil a Purchase Order prior to the date of termination, in which case the Supplier will refund advance payments (if any) in respect of the Purchaser Order that it is not possible to fulfil). Fulfilment of such Purchase Order(s) shall not impair nor render the termination of the Agreement void. If a Purchase Order is issued to the Supplier after the date of the Termination Notice but prior to termination of the Agreement, the Supplier may at its discretion elect to accept the Purchase Order and where the Supplier elects to accept the Purchase Order, the terms of this Agreement will apply to that Purchase Order unless the parties otherwise agree in writing; or
- (b) with immediate effect by way of written notice to the Customer where:
 - (i) the Customer breaches any of the terms of this Agreement or is in Material Default and has not remedied the breach or Material Default within fourteen (14) days of receipt of a notice

from the Supplier, or where the breach or Material Default was incapable of being remedied;

- (ii) the Supplier has requested a Deposit from the Customer pursuant to clause 7.1, and the Customer has delayed or failed to provide the Deposit and the period of such delay or failure exceeds ten (10) business days following the date on which the Supplier requested the Deposit; or
- (iii) any amounts owing to the Supplier by the Customer are overdue by a period of thirty (30) days or more.

15.3 Termination of the Agreement pursuant to this clause 15 shall be without prejudice to the rights of either Party accruing prior to termination.

16 Dispute Resolution

16.1 If a Dispute arises, either Party may by hand, registered post or email, give the other Party written notice of the Dispute identifying and providing details and particulars of the Dispute and entitled Dispute Notice (**Dispute Notice**), within twenty-eight (28) days of the occurrence of the event(s) or circumstance(s) on which the Dispute arises or is based.

16.2 A Party shall not be liable to the other Party in respect of any Dispute (including any claim) in connection with the Agreement where clause 16.1 is not complied with.

16.3 Within seven (7) days of receipt of a Dispute Notice, representatives of the Parties having authority to bind the Parties shall confer to seek to resolve the Dispute or agree on a method of doing so and whether that method shall be binding. If a resolution or method of resolution has not been agreed within twenty-one (21) days of the service of Dispute Notice, the Dispute shall be referred to mediation (except where the Dispute concerns non-payment for Goods provided by the Supplier, in which case there is no obligation on the parties to attend mediation prior to commencing proceedings). All aspects of such mediation shall be subject to "without prejudice" privilege.

16.4 In the event a Dispute is not resolved between the Parties following reasonable efforts to endeavour to resolve the Dispute through mediation, a Party may commence proceedings in relation to the Dispute.

17 Information and Privacy Act

17.1 The Customer will provide the Supplier with personal information to the extent necessary for the Supplier to perform its obligations under this Agreement.

17.2 In collecting, holding and using any such personal information, the Supplier will comply with its obligations under the *New Zealand Privacy Act 2020*.

18 Compliance with laws

18.1 The Parties must at all times comply with all applicable laws, including those pertaining to anti-bribery, improper payments, anti-money laundering, and modern slavery (as applicable).

19 General

19.1 If any provision or part of any provision of the Agreement is unenforceable, such unenforceability shall not affect

other parts of such provision or any other provision of the Agreement.

- 19.2 The Supplier may alter, amend, revise or change any terms of the Agreement with written notice given to the Customer of any such alteration, amendment, revision or change. The Agreement (as amended from time to time) shall apply to all Goods supplied and/or installed by the Supplier for the Customer and shall comprise the entire agreement between the Parties.
- 19.3 Any waiver of either Party of strict compliance with any provision of the Agreement shall not be effective unless the Party giving that waiver provides written notice to the other Party of the waiver.
- 19.4 Written notice for the purposes of this Agreement means notice given by an authorised representative of the Party giving notice, given to the receiving Party by hand, registered post or mail, or by email.
- 19.5 The Agreement shall be governed by and construed in accordance with the laws of New Zealand, and the Parties submit to the exclusive jurisdiction of the courts of New Zealand.
- 19.6 No provision of the Agreement shall be construed adversely against one Party solely on the basis that that Party was responsible for the drafting of that provision.

20 Survival

- 20.1 Clauses 4, 5, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18 and 19 survive the termination of this Agreement.

21 Definitions

- 21.1 In this Agreement:

- (a) **"Agreement"** means this Agreement between the Supplier and the Customer for the provision of Goods comprising of:
- (i) the applicable Purchase Order;
 - (ii) any applicable Quotation issued by the Supplier;
 - (iii) any applicable tax invoice issued by the Supplier; and
 - (iv) these standard terms and conditions of sale and supply.
- (b) **"Consequential Loss"** means:
- (i) loss of profit or anticipated profit, loss of income, loss of revenue, loss of business or business opportunity, loss of financial opportunity, loss of savings (including any failure to realise anticipated savings), loss of contract, loss of goodwill, loss of data, loss of production, loss of use (including in respect of loss of use of equipment, items or assets or downtime costs), whether the loss is direct or indirect;
 - (ii) exemplary, punitive, aggravated or nominal damages; or
 - (iii) any other loss, cost, damage, expense or liability that could not fairly and reasonably:
 - (1) be considered to arise naturally (being according to the usual course of things)

as a result of a breach of this Agreement or relevant matter; or

- (2) be contemplated by the Customer and Supplier as at the date of this Agreement as the probable result of a breach of this Agreement or relevant matter,
 - whether actual or contingent, fixed or unascertained, present or future.
- (c) **"Customer"** means the Customer (or any person acting on behalf of and with the authority of the customer) as described on any Purchase Order, Quotation or tax invoice, including their successors or permitted assigns.
- (d) **"Dispute"** means a dispute between the Parties which has arisen in connection with the subject matter or interpretation of the Agreement, including a dispute concerning a claim in tort, contract, under statute, or on any other basis in law or equity available under the law governing the Agreement.
- (e) **"Force Majeure Event"** means any event, act or circumstance (or set of events, acts or circumstances) beyond the control of the Supplier which prevents or delays the Supplier from punctually supplying and/or installing the Goods, and includes, without limitation:
 - (i) fire, flood, explosion, lightning, earthquake, landslide, implosion, storm, tempest, inclement weather, impact (by motor vehicle, aircraft or other aerial device), water ingress, cyclone, subsidence, collapse, natural disaster, act of god, presence of asbestos, radiation or contamination;
 - (ii) serious workplace accident, closure by a statutory authority, malicious damage, theft, denial of access, nation-wide or state-wide industrial action or dispute, lockout, or unexpected or unanticipated labour shortages;
 - (iii) the act of any government, statutory or competent authority, including cancellation of revocation of any approval, authority or permit, change to law or new law (including new legislation);
 - (iv) any unexpected or unanticipated delay within the Supplier's supply chain;
 - (v) the act or order of any government, statutory or competent authority in response to a disease outbreak, epidemic or pandemic (including COVID-19), including but not limited to issuance of public health orders, lockdown, stay-at-home orders or site closures; or
 - (vi) any other event, act or circumstance which prevents or delays the Supplier from punctually supplying and/or installing Goods, which could not be reasonably prevented or overcome.
- (f) **"Goods"** means goods, materials, parts or products sold, supplied and/or installed by the Supplier, as

described in a Purchase Order, Quotation or tax invoice.

- (g) **"GST"** means the Goods and Services Tax imposed by the *Goods and Services Tax Act 1985* and any related act and/or regulations.
- (h) **"Intellectual Property"** means any intellectual or industrial property whether protected by statute, at common law, or in equity, including any trade mark, patent, invention, copyright, or design right (whether or not registrable), in any design, specification, process, technique, software, know how, trade secret, technical information, financial information, business method and confidential information.
- (i) **"Loss"** means any loss, damage, cost (including legal/solicitor costs on a full indemnity basis), expense or liability of whatever kind, whether in respect of loss or damage to property, injury to or death of persons or otherwise, and howsoever arising.
- (j) **"Material Default"** means, in respect of the Customer, the Customer:
 - (i) ceasing (or threatening to cease) to carry on its business activities;
 - (ii) disposing of the whole or substantial part of its assets, operations or business, other than in the ordinary course of business;
 - (iii) ceasing to be able to pay its debts as and when they become due and payable;
 - (iv) entering into a deed of company arrangement with its creditors;
 - (v) having a receiver, receiver and manager, provisional liquidator, liquidator, administrator, trustee in bankruptcy, or other like person appointed to deal with the whole or substantial part of the Customer's assets, operations or business; or
 - (vi) being wound up (whether voluntarily or involuntarily) or being made or becoming insolvent.
- (k) **"Mixed Goods"** means where:
 - (i) the Customer makes a new object from the Goods, whether finished or not; or
 - (ii) the Customer mixes or otherwise comingles the Goods with other articles, goods or products; or
 - (iii) the Goods become part of another product.
- (l) **"PPSA"** means the *Personal Property Securities Act 1999* as may be amended or replaced from time to time.
- (m) **"Price"** means the price payable for the Goods in accordance with clause 3.
- (n) **"Purchase Order"** means any purchase order, work order, work authorisation or any other form (including the correspondence and documents referred to in clause 1.3) from the Customer requesting the supply and/or installation of Goods

from the Supplier (whether issued verbally or in written form).

- (o) **"Quotation"** means any quotation provided by the Supplier to the Customer in respect of a Purchase Order.
- (p) **"Parties"** means the Customer and Supplier.
- (q) **"Related Company"** has the same meaning as given to that term in the *Companies Act 1993* as may be amended or replaced from time to time.
- (r) **"Supplier"** means ARA Group NZ Ltd trading as Metalbilt NZBN 9429042442738 and its Related Companies to the extent of the involvement of any such Related Entities in the supply and/or installation of Goods.