

# **Terms and Conditions**

## **Sykes Transport WA**

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**Matchbury Enterprises Pty Ltd (ABN: 74 058 749 036) trading as Sykes Transport WA** is referred to in these terms and conditions as **“Company”, “we”, “us”, “our”** and similar grammatical forms.

These Terms apply to all Dealings between us and any Customer unless otherwise agreed to in writing in accordance with these Terms. By engaging in Dealings with us, you agree to the following terms and conditions.

## **1. DEFINITIONS AND INTERPRETATION**

1.1 Any references to the term ‘day’ means a day that is not a public holiday in Western Australia.

1.2 Words importing the singular shall include the plural and vice versa.

1.3 Capitalised terms or expressions used in these Terms have the meanings set out in this clause:

**“Authorised Representative”** means the Managing Director and the Operations Manager as nominated by Sykes Transport WA from time to time.

**“Code”** means the *Australian Code for the Transport of Dangerous Goods by Road and Rail* as amended from time to time.

**“Con-Note”** means the Consignment Note that is the subject of the dealings between the Company and the Customer.

**“Customer”** includes any individual, entity, corporation, trustee, trust, principal, agent or any other legal persons or entities for whom the Company has provided or is providing services to in their Dealings. This includes anyone identified in any Con-Note, including every consignor, consignee, sender or receiver (including any identified or described therein) and anyone enjoying the benefit (whether directly or indirectly) of any part of the Services.

**“Dangerous Goods”** includes any Goods that are “dangerous goods”:

- i. under the Code and its appendices;
- ii. under the *Dangerous Goods Safety Act 2004 (WA)* and its regulations; and
- iii. including any receptacle, container, package, packaging, pallet or thing in or on which they are contained or with which they are stored or handled.

**“Dealings”** includes any activities, transactions or communications relating to the Services provided by the Company to the Customer.

**“Force Majeure”** means an event caused by circumstances beyond our control, including, without limitation, strikes, work stoppages, lock-out, natural disasters, pandemics, epidemics, quarantines, shortages, accidents, acts of war or terrorism, civil or military disturbances, nuclear or natural catastrophes, and interruptions, loss or malfunctions of utilities, communications or computer (software and hardware) services.

**“Goods”** includes any item, object or thing that is referred to or required in any Dealing which includes or incorporates any part of these terms.

**“Laws”** means any and all laws, rules, regulations, ordinances, directives, orders and other matters enacted, promulgated, in force or effective by, for or with respect to any federal, state, local or other government, governmental authority, tribunal, agency or other body, and any political or other division or subdivision of any of the same, applicable to any of our Services, which includes but is not limited to: *International Maritime Dangerous Goods Code*; *Competition and Consumer Act 2010 (Cth)*; *Dangerous Goods Safety (Road and Rail Transport of Non-explosives) Regulations 2007 (WA)*; *Road Traffic (Vehicles) Act 2012 (WA)*; *Dangerous Goods Safety Act 2004 (WA)*; *Dangerous Goods Safety (Storage and Handling of Non-explosives) Regulations 2007 (WA)*; *Medicines and Poisons Act 2014 (WA)*; *Medicines and Poisons Regulation 2016 (WA)* and the Code.

**“Notice”** means a written notice which complies with Clause 11 of these Terms.

**“Prescribed Poisons”** includes any substance referred to in *Medicines and Poisons Act 2014 (WA)* and its statutory equivalent in each State and Territory of Australia, in any relevant Laws and any Standard for the Uniform Scheduling of Medicines and Poisons applicable or adopted in any part of Australia.

**“Services”** includes any operation or service including any carriage, cartage, transport, loading, unloading, holding, handling, storage, decanting, picking, packing, distribution, forwarding, installation, assembly, erection, removal, discharge, cleaning, preparation, maintenance of conduct in respect of any goods or thing referred to or required in any Dealing which includes or incorporates any part of these terms.

**“Sykes Transport WA”** means the Company, including its employees and agents.

**“Terms”** means the terms and conditions referred to in this agreement.

## **2. WHOLE AGREEMENT**

- 2.1 No other term, condition, agreement, warranty, representation or understanding whether express or implied or in any way extended to otherwise relating to or binding on Sykes Transport WA with respect to any Goods or any part of the Services (other than these Terms and any other by which Sykes Transport WA has agreed to be bound in writing) is made or given and any term which might otherwise be implied is expressly excluded.
- 2.2 If Sykes Transport WA publishes material concerning its Services or prices which is incompatible with these Terms, that material is expressly excluded to the extent of incompatibility.

### **3. VARIATION CLAUSES**

- 3.1 No variations to the Terms sought to be imposed by the Customer shall apply unless the mechanisms outlined in Clause 3 and Clause 11 have been followed.
- 3.2 Only an Authorised Representative of either party may request or approve a variation to the Terms.
- 3.3 An Authorised Representative seeking a variation to the Terms must send a Notice to the Authorised Representative of the other party, setting out the following information:
- a. that the Notice is a request for a variation or cancellation of Terms;
  - b. the clauses of the Terms sought to be varied;
  - c. details of the variation sought; and
  - d. proposed date that the variation will come into effect.
- 3.4 The other party has 10 days to respond by sending a Notice either:
- a. accepting the variation;
  - b. rejecting the variation; or
  - c. proposing a different variation.
- 3.5 Any variation of the Terms only has effect if it has been agreed upon in writing by the Authorised Representatives of both parties.
- 3.6 The varied terms will take effect on the proposed date as agreed upon by both parties.

### **4. CUSTOMER'S ACKNOWLEDGEMENTS, WARRANTIES AND OBLIGATIONS**

The Customer acknowledges, warrants and agrees:

- 4.1 These Terms will apply to all Dealings with Sykes Transport WA notwithstanding that any such Dealing may be endorsed with or purport to incorporate any other Terms (including any conditions of cartage endorsed on or associated with any Con-Note or found on any older Sykes Transport WA document).
- 4.2 To pay Sykes Transport WA all charges of accounts in relation to any part of any Services within 30 days of date of invoice.
- 4.3 To pay interest on overdue accounts at the rate prescribed under the *Civil Judgments Enforcement Act 2004* (WA) plus 3% without effecting any rights of Sykes Transport WA under these Terms or under any dealing which includes or incorporates any part of these Terms.
- 4.4 Anyone purporting to sign any Con-Note or enter any Dealing with Sykes Transport WA for or on behalf of the Customer shall be, and be conclusively deemed to be, authorised to do so on behalf of the Customer and will bind the Customer under these Terms.

- 4.5 If any part of any store is made available for use by the Customer and the Customer assumes control or responsibility for any Goods stored therein, these Terms will continue to apply.
- 4.6 Each order the Customer places shall be and be deemed to be a representation by it that it is able to pay all of its debts as and when they fall due and it will remain solvent in the future.
- 4.7 Failure to pay Sykes Transport WA in accordance with these Terms shall be, and be deemed to be, conclusive evidence that the Customer had no reasonable grounds for making the representation referred to in Clause 4.6.
- 4.8 The Customer has not relied on any representation, condition or warranty, express or implied, to Sykes Transport WA's skill, competence or efficiency in dealing with any Goods or providing any Services.

## **5. CUSTOMER'S OBLIGATION PRIOR TO SYKES TRANSPORT WA TAKING POSSESSION OF GOODS**

Prior to Sykes Transport WA taking possession of or Dealing in any way with any Goods, the Customer acknowledges, warrants and agrees:

- 5.1 All Goods the subject of any part of the Services are either owned by the Customer or the Customer is authorised to deal with them.
- 5.2 To identify and fully describe Goods on or with every applicable Con-Note or Dealing, in compliance with all Laws to include complete details of the name, nature and value and specifying any which are liquid, gaseous, noxious, dangerous, hazardous, flammable, Dangerous Goods or Prescribed Poisons, and specifying any which are capable in any way of causing damage, injury or loss to any goods, person or thing, whether alone or in conjunction with anything else. Where Goods are capable of damage, injury or loss, the Customer must also specify the damage, injury or loss.
- 5.3 That all particulars in any Con-Note or Dealing in respect of Goods or Services will be complete and correct in every respect and that Sykes Transport WA may rely thereon.
- 5.4 That in relation to any Dangerous Goods or Prescribed Poisons, the Customer will supply Sykes Transport WA with a written declaration in compliance with all relevant Laws detailing the nature of the Goods and all procedures necessary for safe dealing with them at all times, including in the case of accident, fire, spillage, contamination or any other incident.
- 5.5 That the Customer will ensure all goods have been packed and marked in compliance with all relevant laws. All goods the subject of any part of the Services will comply at all times with all requirements of the consignor and the consignee, all applicable Laws, requirements of all relevant authorities including any armed forces, police, security, port, harbour, dock, railway, shipping, air way, customs, warehouse and/or any other authority, governmental or non-governmental, whether having the force of law or otherwise and whether relating to the nature, packaging, carriage, storage notification, labelling, volumes, scheduling, identification or condition of the Goods, any part of the services or otherwise.
- 5.6 All Goods the subject of any part of the Services are or will be packed in a manner adequate to withstand the ordinary processes and risks involved in any Services applicable thereto.

## **6. HOW SYKES TRANSPORT WA IS ENTITLED TO DEAL WITH THE GOODS AND CARRY OUT SERVICES**

- 6.1 Sykes Transport WA may refuse to provide any part of any Services and may refuse to deal with any Goods at its discretion.
- 6.2 Any method of performing any part of the Services adopted by Sykes Transport WA shall remain at the discretion of Sykes Transport WA and the Customer authorises Sykes Transport WA to adopt any method considered appropriate despite any particular method selected or nominated by the Customer.
- 6.3 Sykes Transport WA is authorised to deal with any Goods in any way it deems fit if any part of the Goods, any documentation, labelling, packaging or warnings etc fail to comply with any Laws or are damaged, defaced or illegible.
- 6.4 The Customer authorises Sykes Transport WA to destroy, dispose of, abandon or render harmless any Goods which in the opinion of Sykes Transport WA are, or are likely to become, dangerous or hazardous. The Customer agrees to reimburse Sykes Transport WA for any costs incurred in destroying, disposing, abandoning or neutralising the Goods.
- 6.5 Sykes Transport WA does not have an obligation to package, re-package, repair or maintain any packaging or container associated in any way with any part of the Services or any Goods but may elect to do so at the Customer's cost.
- 6.6 Sykes Transport WA is authorised to store, warehouse and/or hold any Goods in respect of and/or during the performance or attempted performance of any part of the Services as Sykes Transport WA in its absolute discretion deems necessary, and the Customer agrees to indemnify Sykes Transport WA for any costs incurred in doing so.
- 6.7 Sykes Transport WA may deliver the Goods or any part thereof to places other than those specified, as it elects.
- 6.8 Anyone at any delivery address (whether specified or as elected by Sykes Transport WA) may accept delivery on behalf of the Customer.
- 6.9 Any signature or initial purporting to acknowledge delivery for or on behalf of the Customer shall be, and be deemed, conclusive evidence of delivery.
- 6.10 Sykes Transport WA will not be liable for any delay in providing any Services and may allocate its resources and facilities between Customers at its absolute discretion.

## **7. TERMS GOVERNING THE AGENCY RELATIONSHIP**

The Customer acknowledges, warrants and agrees:

- 7.1 That Sykes Transport WA is and shall be the Customer's agent to enter into any Dealing with anyone in order to provide any part of the Services and the Customer will be responsible for all costs and charges payable as a result of any such Dealing.

- 7.2 Anyone with whom the Customer (through the agency of Sykes Transport WA) has any Dealings, is in turn the Customer's agent for the same purposes and on the same terms as in Clause 7.1.
- 7.3 These Terms will operate for the benefit of anyone providing any part of the Services whether as agent or sub-agent of the Customer, Sykes Transport WA or otherwise and any such person shall be and be deemed a party to every Dealing incorporating any part of these Terms.
- 7.4 These Terms are available to and extend to protect anyone who is or might be vicariously liable for any act or omission of any one referred to in Clause 7 and such person shall be deemed party to every Dealing incorporating any of these Terms.
- 7.5 Any Dealings incorporating any of these Terms shall be deemed to be an offer by the Customer (which will remain irrevocable until completion of the Services) made to each person involved in the performance of the Services and be deemed to be communicated to each person and accepted by them upon the performance by them of any part of the Services, in consideration for any such person entering into any Dealing to perform any part of these Terms.

## **8. LIMITATION OF LIABILITY**

The Customer acknowledges, warrants and agrees:

- 8.1 That Sykes Transport WA has no obligation or responsibility to collect any payment on behalf of the Customer or any party, even if this purports to be part of any Dealing between Sykes Transport WA and any Customer.
- 8.2 That:
  - a. Sykes Transport WA will not be liable for any claim in tort, bailment or contract whether for trespass, negligence, misfeasance, wilful act or omission, default or otherwise and whether claiming for contingent, consequential, direct, indirect, special or punitive damages or otherwise, other than as set out in Clause 8.5; and
  - b. no claim shall be made against Sykes Transport WA by or through the Customer or by any third party who has or maybe hereafter have any interest in any part of any Services or Goods or otherwise, which imposes or attempts to impose any liability whatsoever in connection with any part of the Services or otherwise.
- 8.3 Without limiting the generality of Clause 8.2, that provision will extend to any loss, damage, expense, liability (including any liability under any Laws) or costs whatsoever associated in any way with:
  - a. any accident or incident involving the Goods or any part of the Services;
  - b. any salvage, recovery or clean-up relating to any accident or incident involving any goods or any part of the Services
  - c. any misdelivery, non-delivery, delay in delivery, concealed damage, deterioration, contamination or evaporation or other diminution in value of any Goods;



- d. any conduct by any party involved in the provision of any part of the Services, whether or not the conduct was within the contemplation of or foreseeable by the Customer or Sykes Transport WA or would constitute a breach (whether fundamental or otherwise) by Sykes Transport WA of any of these Terms or of any Dealings incorporating any part of these terms.
- 8.4 The Customer agrees to indemnify Sykes Transport WA against any loss, damage, expense or liability (including any liability under any Laws), including anything contemplated by Clause 8.2 or 8.3 and/or from any consequence arising therefrom or otherwise resulting in any way from any failure by the Customer to comply with or observe any part of these Terms or of any dealing which incorporates any part of these terms, whether arising as a result of negligence by the Customer.
- 8.5 Sykes Transport WA at its sole discretion may choose the remedy to be provided to the Customer in relation to any claim that the Customer may have against Sykes Transport WA. The sole remedies available for any liability of Sykes Transport WA under these Terms shall be limited to either:
  - a. a re-supply of the Services to the Customer; or
  - b. a replacement of the Goods with equivalent goods.
- 8.6 Any re-supply of the Services will not exceed the original purchase price of the Services.
- 8.7 Any replacement of Goods will not exceed the original purchase price that the Customer paid for the Goods.
- 8.8 That Sykes Transport WA is authorised to name the Customer as consignor in any document and that Sykes Transport WA is not and will not be deemed a consignor within the meaning of any applicable Laws.
- 8.9 Any advice or assistance given for or on behalf of Sykes Transport WA shall be accepted at the Customer's risk and shall not be deemed to be given as expert or adviser nor to have been relied upon by or through the Customer.

## **9. PAYMENT AND INDEMNIFICATION OBLIGATIONS**

- 9.1 The Customer agrees to pay any duty, impost, GST, capital gains tax, excise, and penalty in respect of any part of any Goods or Services or relating to any loss, damage, expense, liability or costs or otherwise. Where Sykes Transport WA incurs any such costs, the Customer agrees to reimburse Sykes Transport WA. The Customer acknowledges and agrees that Sykes Transport WA has no obligation to indemnify the Customer for any of these costs.
- 9.2 No money paid by or on behalf of the Customer to Sykes Transport WA will be refundable.
- 9.3 The Customer must indemnify Sykes Transport WA all charges and expenses in respect of or consequent upon any delay in performance or attempted performance of any part of the Services whatsoever, including any delay in pick up or delivery.
- 9.4 Whenever any dealing with Sykes Transport WA includes an arrangement for payment by any third party, the Customer:

- a. remains liable to pay all monies due and owing to Sykes Transport WA; and
  - b. will forthwith pay Sykes Transport WA if the third party fails to pay as and when payment is due.
- 9.5 The Customer agrees to pay Sykes Transport WA all costs and expenses incurred by Sykes Transport WA or their solicitors, legal advisers, mercantile agents and any other party acting on behalf of any of them relating in any way to the Goods and/or Services or anything arising under these Terms on a full indemnity basis.

## **10. LIENS AND SECURITIES**

In addition to any existing general or specific lien:

- 10.1 The Customer hereby grants to Sykes Transport WA a general lien over all Goods and any documents relating thereto which are in Sykes Transport WA possession, custody or control from time to time until payment of all monies owed to Sykes Transport WA
- 10.2 The Customer authorises Sykes Transport WA to use its absolute discretion to sell or otherwise dispose of any perishable Goods, Dangerous Goods or Prescribed Poisons which are in the possession, custody or power of Sykes Transport WA, without notice to the Customer or any other interested party and at the Customers cost in all things, but without Sykes Transport WA having any obligation or responsibility to do so,
- 10.3 The Customer authorises Sykes Transport WA to sell or otherwise dispose of any Goods in its possession, custody or power, upon expiration of 21 days after written notice to the Customer.
- 10.4 Sykes Transport WA may apply the net proceeds of any such sale or disposition towards any monies owed by the Customer.
- 10.5 The Customer indemnifies Sykes Transport WA in respect of any loss, damage or liability as a result of exercise of any of the rights arising under Clause 10, in addition for any other indemnity in these Terms.
- 10.6 The Customer irrevocably grants a security interest in favour of Sykes Transport WA over the Customer's:
- a. books of account, financial records, goodwill, documents of title and current and later acquired real and intellectual property; and
  - b. the whole of its other undertakings, property, assets and revenue.
- 10.7 The Customer consents to Sykes Transport WA registering its security interests on any applicable government registry.
- 10.8 These provisions of Clause 10 will survive termination of the Terms.

## **11. NOTICE**

- 11.1 Any Notice given under these Terms must be in writing, signed by an Authorised Representative and be delivered personally to an Authorised Representative of the other party by pre-paid post or email.
- 11.2 A Notice is deemed to have been received:
- a. if delivered by hand to the nominated address, when delivered to the nominated address;
  - b. if sent by pre-paid post, the second day after the date of posting; or
  - c. if sent by email, at the time the email is sent (as recorded on the device from which the sender sent the email) unless the sender receives an automated message that the email has not been delivered.
- 11.3 In proving the service of any notice, it will be sufficient to prove, in the case of a letter, that such letter was properly addressed, stamped and placed in the post and, in the case of an email, that such email was sent to the specified email address of the addressee.
- 11.4 The provisions of this clause will not apply to the service of any proceedings or other documents in any legal action.

## **12. DEFAULT**

- 12.1 The following events shall constitute a default under these Terms:
- a. where the Customer fails to make any payment when due;
  - b. where the Customer fails to comply with its obligations prior to Sykes Transport WA taking possession of goods, as stated under Clause 5;
  - c. where the Customer breaches the Terms.
- 12.2 Where the Customer is in default, Sykes Transport WA may send a Notice to the Customer setting out the details of the default and demanding the default be remedied within 14 days of receipt of the Notice.
- 12.3 Sykes Transport WA will be entitled to suspend performance of the Services until the Customer remedies the default. Sykes Transport WA will not be liable for any costs or losses the Customer may incur arising directly or indirectly from the suspended or delayed performance.
- 12.4 If the Customer fails to remedy the default within 14 days after receipt of the Notice, Sykes Transport WA may do any or all of the following:
- a. immediately terminate the Terms;
  - b. suspend or withdraw all Services;
  - c. declare all monies owed to be immediately due and payable; and

- d. immediately exercise any and all rights and remedies available to Sykes Transport WA at law or in equity.
- 12.5 The Customer will be liable to indemnify Sykes Transport WA for any costs or losses incurred directly or indirectly as a result of the default.
- 12.6 If any dispute arises concerning any Dealing (including any question of identity or authority or any telephone, facsimile, e-mail, e-commerce or computer-generated order) the internal records of Sykes Transport WA will be conclusive evidence in all respects.

### **13. TERMINATION**

- 13.1 Sykes Transport WA may terminate the Terms and Services with immediate effect without giving Notice if:
  - a. The Customer fails to remedy a default as per Clause 12.4;
  - b. Where the Customer commits an act of insolvency or becomes insolvent, including bankruptcy, liquidation, receivership or administration;
  - c. The Customer commits a material breach of a provision of the Terms and that breach is irremediable.
- 13.2 Termination of these Terms does not affect any rights, remedies, obligations or liabilities of the parties that have accrued up to the date of termination, including the right to claim damages for any breach of the Terms that existed at or before the date of termination.
- 13.3 Any provision of the Terms that expressly or by implication is intended to come into or continue in force on or after termination will remain in full force and effect.

### **14. DISPUTE RESOLUTION PROCESS**

- 14.1 The dispute resolution clause in these Terms shall be the exclusive mechanism for resolving any disputes arising under these Terms or relating to the Services.
- 14.2 If a dispute arises, each party will nominate a representative to participate in the dispute resolution process under these Terms.
- 14.3 Each party will attempt to resolve any disputes in good faith prior to commencing legal action.
- 14.4 A dispute shall be considered to have arisen when one party sends the other party a Notice of dispute relating to these Terms or Services.
- 14.5 The parties will engage in informal negotiations in an attempt to resolve any disputes within 5 days from receipt of the Notice of dispute.
- 14.6 In the event that the disputes cannot be resolved within the period of time, the parties agree to submit the dispute to a mediation.

- 14.7 The rights and remedies of Sykes Transport WA arising by reason of these Terms are cumulative with and not exclusive to any other rights or remedies provided by Law or by any other agreement with the Customer but these Terms will prevail in the event of any conflict or contradiction.

## **15. INSURANCE**

- 15.1 Sykes Transport WA has no obligation to insure any part of any Goods or Services.
- 15.2 Any insurance is the responsibility of the Customer and at the Customer's cost in all things.
- 15.3 The Customer is obliged to obtain and maintain any relevant insurance associated with the Goods and Services. By entering into these Terms, the Customer warrants that they have the necessary insurance.
- 15.4 Where the Customer does not have the necessary insurance, Sykes Transport WA may, at its sole discretion increase its charges to reflect the cost of the missing insurance. The Customer must provide to Sykes Transport WA all information and documentation Sykes Transport WA deems relevant to determining the increased charges.
- 15.5 In any Dealings with Sykes Transport WA which includes a specific written obligation upon Sykes Transport WA to insure any Goods and Services:
- a. The cost of such insurance will be an extra charge to the Customer,
  - b. The Customer will not do or omit to do anything which renders any contract of insurance or any part thereof void or voidable or diminished in any way the liability of the insurer.

## **16. SEVERABILITY**

- 16.1 If the whole or any part of a provision of these Terms is or becomes invalid or unenforceable under the law of any jurisdiction, it is severed in that jurisdiction to the extent that it is invalid or unenforceable.
- 16.2 Any part of these Terms being a whole clause or part of a clause is capable of severance without affecting any other part of these Terms.
- 16.3 The invalidity, unenforceability or severance of any part of these Terms has no effect on the remainder of the Terms as a whole.

## **17. FORCE MAJEURE**

- 17.1 Sykes Transport WA will not be responsible or liable for any failure or delay in the performance of its obligations hereunder arising out of or caused by, directly or indirectly, a Force Majeure event.
- 17.2 If a Force Majeure event takes place that affects the performance of Sykes Transport WA's obligations under the Terms:

- a. Sykes Transport WA will contact the Customer as soon as reasonably practicable;
  - b. Sykes Transport WA's obligations under the Terms will be suspended and the time for performance of its obligations will be extended for the duration of the Force Majeure event; and
  - c. Sykes Transport WA will arrange a new date for performance of the Services with the Customer after the Force Majeure event is over.
- 17.3 The Customer may terminate the particular consignment under the Services which are affected by a Force Majeure event which has continued for more than 30 days by serving a Notice to Sykes Transport WA.

## **18. WAIVER**

- 18.1 Neither party may rely on the words or conduct of any other party as being a waiver of any right, power or remedy arising under or in connection with these Terms unless the other party or parties expressly grant a waiver of the right, power or remedy. Any waiver must be served as a Notice in accordance with Clause 11, signed by the party granting the waiver and is only effective to the extent set out in that waiver.
- 18.2 Words or conduct referred to in Clause 18.1 include any delay in exercising a right, any election between rights and remedies and any conduct that might otherwise give rise to an estoppel.

## **19. GOVERNING LAWS AND JURISDICTION**

- 19.1 All Dealings and Terms shall be governed by and construed in accordance with the law from time to time in the state of Western Australia and the parties agree to submit to the exclusive jurisdiction of the courts of the State.