

**BUTLER & HEWITT (2015) LIMITED  
TERMS OF TRADE - CONSUMER**

In these Terms of Trade we have used "we", "us", and "our" to refer to BUTLER & HEWITT (2015) LIMITED and "you" to refer to our Customer. By ordering Work from us, you agree to these Terms of Trade to the exclusion of your terms (if any).

**1. OWNERSHIP**

1.1 Ownership of Goods supplied under these Terms of Trade remains with us until payment for the Goods is made in full.

**2. RISK AND DELIVERY OF GOODS**

2.1 Delivery occurs at the time possession of the Goods passes to you (or a person nominated by you) from us. The risk in Goods supplied passes to you on delivery.

**3. INSTALLATION**

3.1 If we agree to install Goods for you, we do so on the basis that it is your responsibility to (unless we agree otherwise):

- (a) promptly provide all necessary plant, materials, services and other resources necessary to enable us to carry out the installation;
- (b) promptly obtain any necessary consent, approval, permit, licence or authorisation to enable us to carry out the installation;
- (c) ensure that the premises and foundations are structurally sound and in a proper condition for the installation to proceed; and
- (d) to provide safe and secure onsite storage for materials and accessories supplied and used by us, our employees and contractors.

3.2 You must advise us promptly of any decision or instruction that needs to be made or given before we are able to proceed with the installation.

**4. ESTIMATES**

4.1 Unless stated otherwise, any price we give you for Work is an estimate ("the Estimate") on a plus GST basis of the anticipated cost for us to complete that Work. The Estimate is subject to clause 5 below.

4.2 The Estimate is open for acceptance for fourteen (14) days after it is dated unless withdrawn by us prior to acceptance.

4.3 We will not commence the Work until you have accepted the Estimate in writing and signed a copy of these Terms of Trade.

4.4 We will advise you when 75% of the Estimate has been exceeded and when the Estimate has been reached.

**5. PRICE**

5.1 Notwithstanding any Estimate given, unless we have agreed in writing to be bound by a set price for the Work, you shall pay to us our actual cost of completing the Work ("the Actual Cost") which will be calculated by totalling the following:

- (a) the number of hours of service multiplied by the hourly rates for the workers involved on the date which the Work is undertaken or if the supply occurs over more than one day, the relevant hourly rates on the last day on which services are rendered;
- (b) any disbursements (including without limitation delivery costs) incurred by us on your behalf;
- (c) the cost of any Goods supplied by us as part of the Work.

5.2 The Actual Cost and all prices are plus GST and other taxes which are payable by you in New Zealand dollars.

5.3 Disbursements incurred by us on your behalf may include a reasonable mark-up by us.

5.4 In the event these Terms of Trade are terminated in accordance with clause 11.2(d) or by you under clause 20 prior to completion of the Work, you must immediately pay us the Actual Cost at the termination date, plus 50% of the balance of the part of the Estimate that relates to the current stage of the Work as described in the agreed task description of the Work.

**6. TERMS OF PAYMENT**

6.1 We may require you to pay a deposit, being an advanced payment for the Work, before we commence the Work.

6.2 Payment for the Work (and any associated expenses and disbursements) is due on the 20th day of the month following the date of our invoice except where we have agreed in writing that other terms shall apply ("the Due Date").

6.3 If you do not make payment on the Due Date, you are in default and must pay default interest at the rate of 12% per annum, which shall accrue on a daily basis on the total amount outstanding from the Due Date to the date of payment in full.

6.4 Notwithstanding clause 6.3, if payment is outstanding for 7 days from the Due Date, we may suspend performing the Work on credit until the date of payment in full (subject always to clause 6.5). You must pay in cash for any Work done by us until payment is made in full (together with any accrued interest).

6.5 We may notify you at any time that we have ceased to carry out the Work on credit. This cessation does not relieve you for amounts owing up to the date on which the contract is terminated.

6.6 Payment of all money shall be without set-off or deduction of any kind.

6.7 We will apportion payments to outstanding accounts as we think fit.

**7. PERFORMANCE OF WORK**

7.1 We will:

- (a) perform the Work with reasonable skill, care and diligence in a professional manner;
- (b) endeavour to ensure that the Work is performed in accordance with any time frames agreed in writing with you;
- (c) liaise with you during the course of performing the Work in accordance with your reasonable requirements.

7.2 You will give reasonable assistance to enable us to perform the Work by:

- (a) giving clear instructions;
- (b) promptly providing any information or content required from you for us to complete the Work;
- (c) ensuring that the Work and products derived from the Work are fit for the purpose you intend to use them for and meet any appropriate statutory, regulatory, governmental and industry and environmental controls, standards or practices.

7.3 If we have given you a time frame for completion of the Work, unless agreed in writing to the contrary such time frame is approximate only and is not deemed to be of the essence of the contract.

**8. PERSONAL PROPERTY SECURITIES ACT 1999 ("PPSA")**

8.1 All terms in this clause 8 have the meaning given in the PPSA and section references shall be to sections of the PPSA.

8.2 Clause 1.1 creates a security interest in Goods we supply to you as part of the Work.

8.3 You shall not grant any other security interest or any lien over Goods that we have a security interest in.

8.4 At our request you shall promptly sign any documents and do anything else required by us to ensure that our security interest constitutes a first ranking perfected security interest in the Goods.

8.5 We may at any time enter your premises and properties to uplift Goods that we have a security interest in.

8.6 If Goods that we have a security interest in are processed, included or dealt with in any way causing them to become accessions, processed or commingled goods, our security interest will continue in the whole in which they are included. You shall not grant any other security interest or any lien in either the Goods or in the whole.

8.7 You waive any rights you may have under sections 114(1)(a), 116, 120(2), 121, 125, 126, 127, 129, 131, 133, and 134 of the PPSA.

8.8 You waive your right to receive a copy of any verification statement (as that term is defined in the PPSA).

8.9 You will give us prior written notice of a proposed change of your name or address.

**9. WARRANTIES**

9.1 The Consumer Guarantees Act 1993, the Fair Trading Act 1986, and other statutes may impose warranties, conditions or obligations upon us which cannot by law (or which can only to a limited extent by law) be excluded. We exclude all such imposed warranties, conditions or obligations to the extent permitted by law and exclude any warranty, condition or obligation imposed or implied under common law, equity or otherwise.

9.2 Where you acquire goods and/or services from us for the purposes of a business:

(a) the parties acknowledge and agree that:

- (i) you are acquiring the goods and/or services covered by these Terms for the purposes of a business in terms of sections 2 and 43(2) of the Consumer Guarantees Act 1993;
- (ii) the goods and/or services are both supplied and acquired in trade from the purposes of the Fair Trading Act 1986 and the parties agree to contract out of sections 9 (Misleading and deceptive conduct generally), 12A (Unsubstantiated representations), and 13 (False or misleading representations); and

(b) you agree that all warranties, conditions, and other terms implied by the Consumer Guarantees Act 1993 or sections 9, 12A, and 13 of the Fair Trading Act 1986 are excluded from these Terms to the fullest extent permitted by law and the parties further acknowledge and agree that it is fair and reasonable that the parties are bound by this clause.

## 10. LIMITATION OF LIABILITY

10.1 The guarantees contained in the Consumer Guarantees Act 1993 are excluded where you acquire Work and/or Goods from us for the purposes of a business in terms of sections 2 and 43 of that Act.

10.2 Except to the extent that the law prevents us from excluding liability and as expressly provided for in clause 10.4, we shall not be liable for any loss or damage or liability of any kind whatsoever (including consequential loss or lost profit or business) whether suffered or incurred by you or another person and whether in contract, or tort (including in negligence), or otherwise and whether such loss or damage arises directly or indirectly from Work or Goods provided by us to you.

10.3 [You shall indemnify us against all claims and loss of any kind whatsoever however caused or arising which is brought by any person in connection with any matter, act, omission, or error by us, our agents or employees in connection with the Work.]

10.4 To the extent that we are liable for any reason for any loss suffered or liability incurred by you arising from any breach of these Terms of Trade or for any other reason, such liability is limited to the amount of the Actual Cost. If Goods are returned by you, or if you make a claim in writing to us in relation to the Goods or services provided under the Work, we may, in our discretion, repair or replace the Goods or re-perform the services, or refund the amount of those Goods or services to you, provided that:

- (a) the Goods must be returned or the claim must be made in writing to us within fourteen (14) days of the Goods or services being provided; and
- (b) you must supply the date and number of any invoice relating to the Work; and
- (c) we must have a reasonable opportunity to inspect the Work.

## 11. DEFAULT

11.1 The security interests created by these Terms of Trade become enforceable if any of the following events occur:

- (a) you fail to pay any money owing on the Due Date;
- (b) you sell, part with possession or dispose of any Goods or do anything inconsistent with our ownership of the Goods prior to making payment in full to us;
- (c) we believe you have committed or will commit an act of bankruptcy, have had or are about to have a receiver or liquidator appointed, or are declared insolvent;
- (d) the Goods are at risk, as that term is defined in the PPSA;
- (e) you neglect or fail to carry on your business to our reasonable satisfaction, or if there is a significant deterioration in your trading or asset position;
- (f) you are otherwise in breach of your obligations under these Terms of Trade.

11.2 If any of the events described in clause 11.1 occur, in addition to any remedies we may have at law, we may do one or more of the following:

- (a) suspend the Work in accordance with clause 6.4;
- (b) charge default interest in accordance with clause 6.3;
- (c) enter on to your premises and repossess any Goods which have not been paid for in full;
- (d) immediately terminate these Terms of Trade by notice in writing to you.

## 12. INTELLECTUAL PROPERTY

12.1 In respect of Intellectual Property used in or arising from the production of the Goods or the performance of the Work:

- (a) all pre-existing Intellectual Property the subject of an Intellectual Property right resides with the owner as at the date of these Terms of Trade (whether you or us);
- (b) any new Intellectual Property will be dealt with in accordance with clause 13.

12.2 If any Work is to be undertaken based on your designs, you warrant that the undertaking of the Work by us will not infringe any third party's Intellectual Property rights and you indemnify us against any loss, liability, costs and expenses in the event of any claim being made that the Work infringes any patent, copyright or other rights of any other person.

## 13. INTELLECTUAL PROPERTY OWNERSHIP

13.1 Subject to clauses 12.1(a) and 13.4 we are and will remain the exclusive owner everywhere in the world of all Intellectual Property rights and interests (including copyright and all other statutory and common law rights and interests) in the Work, and any other work performed by us for you, as first owner of those Intellectual Property rights and interests.

13.2 We shall retain exclusive worldwide ownership at all times of our artistic styles, methods of working, techniques, ideas, skills and know-how.

13.3 You must not attribute the Work to anyone other than us or remove any of our trade marks, signatures, logos or similar from our Work.

13.4 Upon payment of all amounts owing to us in accordance with these Terms of Trade, we assign to you the copyright in the final form of any Work which we have specifically created for you for the countries and for the purposes as specified in the description of the Work, or if not specified, for the countries and for the purposes which would be reasonably expected in light of the nature of your request for the Work.

## 14. PRIVACY OF INFORMATION

14.1 You authorise us:

- (a) to collect, retain and use information about you from any person for the purpose of assessing your creditworthiness;
- (b) to disclose information about you:
  - (i) to any person who guarantees, or who provides insurance, or who provides any other credit support, in relation to your obligations to us;
  - (ii) to such persons as may be necessary or desirable to enable us to exercise any power or enforce or attempt to enforce any of our rights, remedies and powers under these Terms of Trade.

## 15. NOTICES

15.1 Any notice may be given by phone, in person, posted, or sent by fax or email to you (or where you are a company, to any of your directors).

## 16. VARIATION

16.1 We shall be entitled at any time by notice in writing to you to vary any provision of these Terms of Trade and you shall be bound by such variation.

## 17. CONFIDENTIALITY

17.1 You shall at all times treat as confidential all non-public information and material received from us and shall not publish, release, or disclose the same without our prior written consent. For clarity, confidential information includes any new Intellectual Property and prices.

## 18. COSTS

18.1 You must pay our costs (including legal costs, as between solicitor and client) of and incidental to the enforcement or attempted enforcement of our rights, remedies and powers under these Terms of Trade.

## 19. CREDIT INFORMATION

19.1 You consent to us and any financier or credit-rating agency making enquiries of and obtaining any information about your financial standing and creditworthiness.

## 20. TERMINATION

20.1 Either party may terminate these Terms of Trade by giving one month's written notice to the other party.

## 21. JURISDICTION

21.1 These Terms of Trade are governed by and construed in accordance with the current laws of New Zealand and the

parties agree subject to clause 23 to submit to the non-exclusive jurisdiction of the Courts of New Zealand for any disputes or proceedings arising out of or in connection with these Terms of Trade.

## 22. ASSIGNMENT

22.1 You must not subcontract or assign any of your rights, powers or obligations under these Terms of Trade.

## 23. DISPUTES

23.1 Any claim or dispute arising under these Terms of Trade shall be determined by arbitration under the Arbitration Act 1996 if the parties are unable to resolve such dispute themselves within one (1) month of the dispute arising. However, nothing in this clause prevents either party from taking immediate steps to seek any equitable relief before the New Zealand Courts.

## 24. FORCE MAJEURE

24.1 We shall not be liable for delay or failure to perform the Work if the cause of delay or failure is beyond our control.

## 25. SURVIVAL

25.1 The provisions of clauses 1, 2, 6, 9, 10, 11, 12, 13, 15, 17, 18, 21, 23, and 26 of these Terms of Trade and any other provision which by its nature is intended to survive the termination or expiration of these Terms of Trade will survive the termination or expiration of these Terms of Trade or completion of the Work.

## 26. DEFINITIONS

26.1 In these Terms of Trade:

"Goods" shall have the meaning given to it in the Personal Property Securities Act 1999.

"Intellectual Property" includes all intellectual property rights (including without limitation copyright, patent and design rights, drawings, documents, data, ideas, procedures and calculations).

"Work" means our performance of services for you, and the production or supply of any Goods by us as part of or related to such services, as described on the front page of these Terms of Trade.

26.2 The rule of construction known as the contra proferentem rule does not apply to these Terms of Trade.

26.3 Words importing the singular include the plural and vice versa.

26.4 Headings are for convenience only and do not form part of, or affect the interpretation of, these Terms of Trade.

26.5 References to a party include that party's successors, personal representatives, executors, administrators and permitted assigns.

26.6 References to a statute include references to:

(a) regulations, orders, rules or notices made pursuant to that statute;

(b) all amendments to that statute and those regulations, orders, rules or notices, whether by subsequent statute or otherwise; and

(c) any statute passed in substitution of that statute.

26.7 References to "us" include our employees, contractors and agents.