

**BUTLER & HEWITT (2015) LIMITED**  
**TERMS OF TRADE – WHOLESALE / COMMERCIAL**

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 agreeing to acquire goods (and any associated services) from us you agree to these Terms to the exclusion of your terms (if any).

**1. DELIVERY**

1.1 Unless we agree otherwise, delivery will be completed when either:

- (a) the Goods are made available for collection from our outwards goods loading bay, or
- (b) where we have agreed to delivery and/or install the Goods, at the time we have delivered and/or installed the Goods.

1.2 We may charge you storage and transportation expenses if you fail or refuse to take or accept delivery or indicate to us that you will fail to do so.

1.3 We reserve the right to deliver Goods by instalments.

1.4 If we have given you a time for Delivery or installation of the Goods (or any part of them), such time is approximate only and is not deemed to be of the essence.

**2. INSTALLATION**

2.1 If we agree to install Goods for you, we do so on the basis that it is your responsibility to:

- (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.

2.2 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.

**3. TITLE AND RISK**

3.1 We shall retain title to Goods we supply until they have been paid for in full and you have performed all your other obligations under these Terms.

3.2 Risk in all Goods passes to you when the Goods are Delivered. You shall insure Goods for their full price, and shall not sell, dispose or part with possession of them or do anything else inconsistent with our ownership of the Goods, from Delivery until title in them passes to you.

3.3 You shall bear the risk of any damage to the Goods during installation carried out at your premises (except to the extent the damage has been caused by or contributed to by our negligence).

**4. PRICE**

4.1 All prices are plus GST and other taxes and duties, which shall be paid by you.

4.2 Our prices are subject to change without notice.

4.3 Unless we agree otherwise in writing, the amount you will be charged will be the price as at the date of Delivery.

4.4 If we provide a quotation to you, it is based on information available to us at that time and we may charge you more than the amount quoted if our costs (eg the cost of labour, materials, transport, tax, exchange rates or other costs) or the specifications change. Unless otherwise agreed in writing, prices are quoted exclusive of GST.

**5. PAYMENT**

5.1 You must pay for Goods on their Delivery, unless we decide otherwise.

5.2 We may require you to pay a deposit, being an advanced payment for Goods supplied before those Goods are delivered.

5.3 We are under no obligation to supply Goods to you on credit. If we grant you credit, you agree to pay our invoices by the 20th of the month following the date of the invoice.

5.4 You agree to give any further securities as we may from time to time require, in the form required by us, and to comply with all of your obligations under those securities.

5.5 We may notify you at any time that we are going to stop supplying Goods to you on credit. This shall be without prejudice to your obligation to pay amounts owing.

5.6 All payments shall be made without set-off or deduction. Receipt of a cheque, bill of exchange, or other negotiable instrument will not constitute payment and you remain liable for payment until payment is received by us.

5.7 We may apportion payments to outstanding accounts as we see fit.

**6. DEFAULT**

6.1 You will be in Default if:

- (a) you fail to pay an amount due under these Terms by the due date for payment; or
- (b) you commit a breach of any of your other obligations under these Terms, the Security or the terms of any other contract you have entered into, or enter into in the future, with us or one of our related entities; or
- (c) you become insolvent, are wound up, have a receiver appointed, enter into any composition or arrangement with your creditors, do any act which would render you liable to be placed in liquidation or have a receiver appointed over your property, commit an act of bankruptcy, cease to be of full legal capacity, or die;
- (d) Goods that we have retained title to are at risk; or
- (e) an event or a series of events (whether related or not) occurs which, in our opinion, may cause a material adverse change in your ability to meet your obligations to us.

6.2 If you are in Default then we may, at our option, do any one or more of the following:

- (a) charge you default interest at 14% per annum on any late payments calculated on a daily basis from the due date until the date payment is received;
- (b) require you to remedy the default in the manner and within the period that we tell you;
- (c) require you to pay to us all amounts you owe us immediately;
- (d) suspend or terminate your account with us;
- (e) enforce security interests created by these Terms;
- (f) exercise any rights that we have under these Terms or that are available to us at law.

6.3 We may suspend or terminate your account with us at any time in our sole discretion. If your account is terminated, you must immediately pay us any amount you owe us. Termination will not affect any of our rights that have arisen before termination.

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

7.1 Clause 3.1 creates a security interest in Goods we supply to you.

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

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

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

7.5 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.

7.6 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.

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

7.8 You shall give us prior written notice of any proposed change of your name or address.

**8. MORTGAGE SECURITY**

8.1 Where the Goods accede and form part of other property, this clause shall apply to you and to the Guarantor(s) and you and

the Guarantor(s) acknowledge that this clause is reasonably necessary to protect our right to recover monies due. In this clause, "You" includes the Guarantor(s).

8.2 In addition to the provisions herein, you hereby charge in our favour, as security for your obligations to us, all rights, title and interest (including beneficial interest in any Trust) in any property (including but not limited to realty and including any property into which the Goods are acceded, affixed or attached to) owned or held by you.

8.3 You agree that we shall have the right and liberty to complete and have registered a mortgage over any property owned by you to secure monies owed by you AND you hereby irrevocable appoint us as your attorney for the purpose of executing such mortgage AND we shall also have the right at our discretion to register a caveat on any such property for the purpose of protecting the equitable interest created by this clause.

## 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. Other than as expressly provided for in these Terms, 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 for 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 Except as expressly otherwise provided by clauses 9.1 or **Error! Reference source not found.**, 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, or otherwise and whether such loss or damage arises directly or indirectly from Goods or services provided by us to you.

10.2 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 or for any other reason, such liability is limited to the amount of the price of the Goods concerned. If Goods are returned by you, or if you make a claim in writing to us in relation to Goods or associated services provided, we may, in our discretion, repair or replace the Goods or re-perform the services, or refund the price of those Goods 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 Delivery; and

(b) you must supply the date and number of any invoice relating to the Goods; and

(c) we must be given a reasonable opportunity to inspect the Goods.

## 11. INTELLECTUAL PROPERTY

11.1 In respect of Intellectual Property used in or arising from the production of the Goods or the performance of any associated services:

(a) all pre-existing Intellectual Property the subject of an Intellectual Property right resides with the owner as at the date of these Terms (whether you or us);

(b) any new Intellectual Property will be dealt with in accordance with clause 12.

11.2 If any Goods are to be supplied to your design, you warrant that the manufacture and supply of such Goods 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 manufacture or supply of such Goods by us infringes any patent, copyright or other rights of any other person.

## 12. INTELLECTUAL PROPERTY OWNERSHIP

12.1 Subject to clauses 11.1(a) and 12.4 we are and will remain the exclusive owner everywhere in the world of all Intellectual Property rights and interests in the Goods, and any other work performed by us for you, as first owner of those Intellectual Property rights and interests.

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

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

12.4 Upon payment of all amounts owing to us in accordance with these Terms, we assign to you the copyright in the final form of any Goods which we have specifically created for you for the countries and for the purposes as specified in the description of the work to be performed, 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 Goods.

## 13. PRIVACY OF INFORMATION

13.1 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.

## 14. NOTICES

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

## 15. CONFIDENTIALITY

15.1 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.

## 16. COSTS

16.1 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.

## 17. CREDIT INFORMATION

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

## 18. JURISDICTION

18.1 These Terms are governed by the laws of New Zealand. Subject to clause 19, you may take legal action against us only in a New Zealand Court.

## 19. DISPUTES

19.1 Any claim or dispute arising under these Terms 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.

## 20. FORCE MAJEURE

20.1 We shall not be liable for delay or failure to perform our obligations under these Terms if the cause of delay or failure is beyond our reasonable control.

## 21. SURVIVAL

21.1 The provisions of clauses 3, 5, 6, 9, 10, 11, 12, 14, 15, 16, 18, 19, 22, and 23 of these Terms and any other provision which by

its nature is intended to survive the termination or expiration of these Terms will survive the termination or expiration of these Terms or Delivery of the Goods.

## 22. GENERAL

22.1 These Terms replace any earlier representations, warranties, understandings and agreements (whether oral or written), and together with your Credit Application constitute the entire agreement between us and you relating to their subject matter.

22.2 You shall not transfer or assign your rights, powers or obligations under these Terms without our prior written consent.

22.3 If you have entered into these Terms as the trustee of a trust and you have no right to or interest in any of the assets of the trust except in your capability as trustee of the trust, your liability shall be limited to the value of the assets of the trust which now or in the future are (or, but for your wilful neglect or default, would be) in the hands of the trustees for the time being of the trust. This clause does not limit any liability you have to us as a personal guarantor.

22.4 No failure or delay by us in insisting upon the strict performance of these Terms or exercising any right under these Terms will operate as a waiver of those matters.

22.5 We may change these Terms at any time. Any change applies from when we notify you of that change.

## 23. DEFINITIONS

23.1 In these Terms unless the context otherwise requires:

23.2 "Delivery" means the collection of Goods by you or one of your employees, contractors or agents from our premises, unless we have agreed to dispatch Goods for you, in which case delivery shall mean the despatch of the Goods from our premises. If you indicate to us that you will fail or refuse to take or accept delivery, then the Goods are deemed to have been delivered when we are willing to deliver them.

"Default" has the meaning set out in clause 6.

"Goods" shall include any associated services that we supply.

"Intellectual Property" means all intellectual property rights including, without limitation, copyright, patent and design rights, drawings, documents, data, ideas, procedures, calculations and all other statutory and common law rights and interests.

"Security" means all existing and future security held by us that secures your obligations under these Terms.

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

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

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

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

23.7 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.