

TERMS AND CONDITIONS OF TRADE

1. INTERPRETATION

1.1 **Definitions:** In these Terms and Conditions, unless the context otherwise requires:

“**Goods**” means the goods and products including, but not limited to, materials, cabinetry, appliances and benchtops specified in our Proposal.

“**GST**” means goods and services tax chargeable, or to which a person may be liable, under the Goods and Services Tax Act 1985, and any penalties, additional tax or interest payable in respect thereof.

“**Proposal**” means the proposal, quotation and/or specification prepared by us (which may include one or more documents) that specifies the Goods and/or Services we agree to provide to you (and includes, but is not limited to, our Agreement to provide Design Work forms and our Authority to Proceed forms).

“**PPSA**” means the Personal Property Securities Act 1999.

“**Services**” means the services specified in our Proposal.

“**Terms and Conditions**” means these terms and conditions.

“**We**”, “**us**” and “**our**” means Fivegates Limited trading as Maggie Gardner Design.

“**You**” and “**your**” means the purchaser or intending purchaser of the Goods and/or Services.

1.2 **Interpretation:** Unless the context otherwise requires, or as specifically provided otherwise, in the interpretation of these Terms and Conditions headings are to be ignored and references to all or any part of a statute, rule or regulation are to New Zealand statutes and include that statute as amended, consolidated, re-enacted or replaced at any time;

2. PROVISION OF GOODS AND SERVICES

2.1 **Performance:** We will provide you with the Goods and/or Services specified in our Proposal, and any other goods and services you may request and which we agree in writing to provide, on the terms set out in the Proposal and these Terms and Conditions. If you sign and return our Proposal, confirm your acceptance of our Proposal in writing or otherwise instruct us to proceed, you will be deemed to have accepted the Proposal and these Terms and Conditions.

2.2 **Timing:** We will determine, in our sole discretion, the manner and means by which the Services are performed. To the extent we provide any delivery date(s) or timetable to you for the provision of the Goods and/or Services, we will use all reasonable endeavours to meet such delivery date(s) or timetable. Notwithstanding this, due to the number of third parties we need to engage in connection with the provision of the Goods and/or Services, we will have no liability whatsoever to you for any failure to deliver on any date or adhere to any timetable.

3. PRICE AND PAYMENT

3.1 **Price:** The price(s) to be paid for the Goods and/or Services we provide will be specified in our Proposal.

3.2 **Payment:** Unless inconsistent with the payment terms specified in our Proposal, the following shall apply:

- (a) Any deposit required under a Proposal shall be non-refundable.

- (b) If we agree to charge based on an hourly rate, we will take into account the hourly rates and time of our personnel who have worked on the matter. Any invoice for hourly rate charges must be paid within three working days of the date of invoice.

- (c) All payments need to be made by bank transfer to our nominated bank account in cleared and immediately available funds and without set off, deduction or withholding of any kind.

3.3 **Default interest:** If you default for any reason in payment of any amount on the due date (time being strictly of the essence), you will pay to us on demand interest at a rate equal to 5% above the current overdraft rate which we have with our principal bank, calculated by us on a daily basis on the amount so unpaid from the due date until payment. Charging of this interest will not limit any of our other rights or remedies or otherwise in respect of your default.

3.4 **GST:** Unless otherwise advised by us in writing, all prices quoted or otherwise provided by us are exclusive of GST, and/or any other applicable taxes, which are payable by you.

3.5 **Variation of prices:** Notwithstanding anything in clause 3.1 above, we may vary the price(s) you are required to pay for the Goods and/or Services:

- (a) if the cost to us of purchasing or sourcing the Goods, or otherwise supplying the Goods to you, increases after we have submitted our Proposal to you, but only to the extent sufficient to take account of such increased costs;

- (b) if the information you provide to us on which our price(s) is based proves to be incorrect or inaccurate and, as a result, additional cost and/or time is involved on our part to deliver the Goods and/or Services to you; and

- (c) in accordance with clause 5.4.

4. INSPECTION AND DELIVERY

4.1 **Inspection and delivery:** We may, prior to the delivery of any of the Goods to you, particularly where the Goods include cabinetry, require you to inspect the Goods at the location they have been manufactured or are otherwise held. If we request such an inspection, we may (at our sole discretion):

- (a) determine not to deliver the Goods to you until such inspection has taken place and you advise us the Goods conform to the Goods specified in the Proposal;

- (b) if you fail to inspect the Goods within 14 days of any request, pass on to you for payment any storage costs we incur in connection with the Goods; and

- (c) if you fail to inspect the Goods within 30 days of any request, sell the Goods, on such terms we determine at our sole discretion, and apply the proceeds of sale to your indebtedness to us.

4.2 **Notification of defects:**

- (a) Following your inspection of the Goods in accordance with clause 4.1, you will not be entitled to reject or return the Goods. If the Goods are delivered to you without any prior inspection occurring, you must immediately inspect the Goods and notify us of any defects within 24 hours.

- (b) You must notify us of any defect with the Services we have provided within 24 hours of the provision of such Service.
- (c) If you do not notify us of any defect within the relevant period specified in clause 4.2(a) or 4.2(b) above, the Goods and/or Services will be deemed to have been provided without defect in accordance with the Proposal and these Terms and Conditions.

## 5. BUILDING WORKS AND VARIATIONS

- 5.1 **Consents:** You will be solely responsible for obtaining all necessary building permits, consents, compliances and/or certificates required under law (including, but not limited to, the Building Act 2004 and the Resource Management Act 1991) before we commence building work at your premises. Accordingly, when we commence building work we are free to assume all such permits, consents, compliances and/or certificates have been obtained unless you advise us otherwise. We will comply with such requirements to the extent you advise us of the same.
- 5.2 **Plans:** You will be responsible for obtaining all plans, surveys, specifications and designs in relation to your premises that are necessary for us to provide the Goods and/or Services and we will have no responsibility or liability whatsoever to the extent any of the information you provide to us is incorrect.
- 5.3 **Premises fault:** We will have no liability to you to the extent there is any defect or fault with your premises which impacts the Goods and/or Services we provide.
- 5.4 **Variations:** If you request a variation to the Goods and/or Services specified in the Proposal, such variation will not be binding on us unless our 'Variation to contract form' is completed and accepted by us. This form will specify the variation and any resulting change to the price(s) in the Proposal.

## 6. RISK, TITLE AND SECURITY INTEREST

- 6.1 **Risk and title:** All risk in the Goods will pass to you upon delivery. Title in the Goods remains with us until such time as full payment is made in cleared funds for all amounts owing by you for the Goods and the Services provided by us.
- 6.1 **Retention of title:** Until title passes to you, you will hold the Goods supplied as our fiduciary agent. If you default in paying for the Goods on the due date or become, or are deemed to be, insolvent or have a receiver, liquidator, assignee or similar official appointed in respect of any of your assets, we, or our agents, may enter on and/or into any property occupied by you where we reasonably believe the Goods are stored, without notice, and search for and remove and repossess any and all the Goods supplied (without being liable for any damage caused to your property).
- 6.2 **PPSA:** You acknowledge that the retention of title in clause 6.1 above gives rise to a security interest in all the present and after acquired Goods supplied to you to secure the performance of your obligations to us, and the Proposal and these Terms and Conditions are a "security agreement" for the purposes of the PPSA. You waive your right to receive a copy of any verification statements under the PPSA and agree that you will have no rights under (or by reference to) sections 114(1)(a), 116, 120(2), 121, 125, 129, 131, 133 and 134 of the PPSA; and where we have rights in addition to

those in Part 9 of the PPSA, those rights will continue to apply.

## 7. TERMINATION

- 7.1 **No cancellation:** You may not cancel the provision of the Goods and/or Services by us once you have accepted our Proposal without our approval in writing.
- 7.2 **Early termination:** If you breach or fail to perform any of your obligations, we may, by notice in writing to you, terminate the supply of the Goods and/or Services to you. Termination by us will be without prejudice to any of our rights or remedies accrued prior to termination and will not prejudice our right to recover any amount outstanding notwithstanding that the due date for payment may have not yet arisen.

## 8. REPRESENTATIONS AND WARRANTIES

- 8.1 **Consumer Guarantees Act:** If the Goods and/or Services are acquired by you for business purposes, you agree that the Consumer Guarantees Act 1993 will not apply to the supply of the Goods and/or Services.
- 8.2 **Our representations:** You may not rely on any representation or warranty which has not been expressly stated in the Proposal or these Terms and Conditions.
- 8.3 **Goods warranty:** If the Goods we provide to you have been supplied to us by other manufacturers, you shall be entitled to such benefits as we may receive under any warranties given to us by the manufacturer to the extent we are able to pass these on to you. Notwithstanding any other provision of the Proposal or these Terms and Conditions, we will not otherwise have any liability to you in respect of such Goods.

## 9. LIMITATION ON LIABILITY AND INDEMNITY

- 9.1 **Repair or refund:** Where any of the Goods and/or Services supplied are determined to be defective or otherwise do not conform to the Proposal, we, at our sole discretion, may supply replacement Goods and/or Services, repair any defective workmanship or refund the purchase price paid for the relevant Goods and/or Services.
- 9.2 **Liability:** We will not be liable for:
  - (a) any loss of profits or any consequential, indirect or special loss, damage or injury of any kind suffered or incurred by you arising directly or indirectly from the performance or non-performance of our obligations to you, any breach of our obligations under or in connection with the Proposal and these Terms and Conditions or from any negligence, misrepresentation or other act or omission on our part or the part of our employees, agents or contractors;
  - (b) any costs, damages, expenses or losses suffered or incurred by you in respect of (i) acts or omissions of your contractors (including, but not limited to, the installation of the Goods where we do not carry out the installation), (ii) the fair wear and tear of the Goods resulting from use, (iii) water or heat not associated with any installation by us, (iv) repairs which are not carried out by us or (v) your failure to use the Goods for their intended purpose or in accordance with the manufacturer's instructions.

9.3 **Maximum liability:** Notwithstanding anything else in the Proposal or these Terms and Conditions, our liability, whether in contract, tort or otherwise, in respect of any and all claims for costs, damages, expenses, loss or injury arising from breach of any of our obligations arising under or in connection with the Proposal and/or these Terms and Conditions, or from any negligence, misrepresentation or other act or omission on our part, or the part of our employees, agents or contractors, will not in aggregate exceed the price for the Goods and Services provided for in the Proposal, or the direct damages that you actually incur or suffer, whichever is less.

## 10. GENERAL

10.1 **Intellectual property:** All copyright and other intellectual property in all plans, designs, drawings and specifications we provide to you will be our sole and exclusive property, and you will have no right to use the same, until all amounts owed to us in respect of the Proposal have been paid to us in full.

10.2 **Circumstances beyond our control:** Notwithstanding any other provision of the Proposal and these Terms and Conditions, non-performance by us of our obligations will be excused, without liability for non-performance, during the time and to the extent that such performance is prevented, wholly or partly, by any act of God, fire, earthquake, storm, flood, landslide, strike, lockout, work stoppage or other labour hindrance, explosion, water shortage or public mains electrical supply failure, sabotage, riot, civil disturbance, national emergency, terrorism, act of war or any other cause beyond our reasonable control.

10.3 **Assignment:** You may not assign or otherwise transfer your rights or obligations under the Proposal and/or these Terms and Conditions to any other person without our consent (which may be withheld at our complete discretion).

10.4 **Subcontracting:** We may contract one or more third parties to perform some or all of our obligations under the Proposal and these Terms and Conditions without your consent.

10.5 **Entire agreement:** These Terms and Conditions and the Proposal constitute our entire agreement and understanding (express and implied) with you and supersedes and cancels all previous agreements and understandings we had with you, whether written or oral.

10.6 **No waiver:** No waiver of any breach, or failure to enforce any provision, of the Proposal or these Terms and Conditions at any time by us will in any way affect, limit or waive our right thereafter to enforce and compel strict compliance with the provisions of the Proposal or these Terms and Conditions.

10.7 **Variation:** These Terms and Conditions may only be varied in writing signed by you and us.