

Design A Gift (NZ) Limited - Terms & Conditions of Trade

- 1. Definitions**
 - 1.1 "Seller" shall mean Design A Gift (NZ) Limited and its successors and assigns.
 - 1.2 "Buyer" shall mean the Buyer or any person acting on behalf of and with the authority of the Buyer.
 - 1.3 "Guarantor" means that person (or persons), or entity that agrees herein to be liable for the debts of the Buyer on a principal debtor basis.
 - 1.4 "Goods" shall have the same meaning as in section 2 of the Sale of Goods Act 1908 and are goods supplied by the Seller to the Buyer (and where the context so permits shall include any supply of Services as hereinafter defined).
 - 1.5 "Services" shall mean all services supplied by the Seller to the Buyer and includes any advice or recommendations (and where the context so permits shall include any supply of Goods as defined above).
 - 1.6 "Price" shall mean the cost of the Goods as agreed between the Seller and the Buyer subject to clause 4 of this contract.
- 2. Acceptance**
 - 2.1 Any instructions received by the Seller from the Buyer for the supply of Goods and/or the Buyer's acceptance of Goods supplied by the Seller shall constitute acceptance of the terms and conditions contained herein.
 - 2.2 Where more than one Buyer has entered into this agreement, the Buyers shall be jointly and severally liable for all payments of the Price.
 - 2.3 Upon acceptance of these terms and conditions by the Buyer the terms and conditions are irrevocable and can only be rescinded in accordance with these terms and conditions or with the written consent of the manager of the Seller.
 - 2.4 None of the Seller's agents or representatives are authorised to make any representations, statements, conditions or agreements not expressed by the manager of the Seller in writing nor is the Seller bound by any such unauthorised statements.
 - 2.5 The Buyer undertakes to give the Seller not less than seven (7) days prior written notice of any proposed change in the Buyer's name and/or any other change in the Buyer's details (including but not limited to, changes in the Buyer's address, facsimile number, or business practice).
- 3. Goods / Services**
 - 3.1 The Goods and/or Services are as described on the invoices, quotation, work authorisation or any other work commencement forms as provided by the Seller to the Buyer.
 - 3.2 The Buyer acknowledges that the Seller will not be held liable for any indirect or consequential damages or claims due to any injury caused by the Goods during use.
- 4. Price And Payment**
 - 4.1 At the Seller's sole discretion the Price shall be either;
 - (a) as indicated on invoices provided by the Seller to the Buyer in respect of Goods supplied; or
 - (b) the Seller's current Price, at the date of delivery of the Goods, according to the Seller's current Price list; or
 - (c) Seller's quoted Price (subject to clause 4.2) which shall be binding upon the Seller provided that the Buyer shall accept in writing the Seller's quotation within thirty (30) days.
 - 4.2 Any variation from the plan of scheduled works or specifications will be charged for on the basis of the Seller's quotation and will be shown as variations on the invoice. Payment for all variations must be made in full at their time of completion.
 - 4.3 At the Seller's sole discretion a deposit may be required. The deposit amount or percentage of the Price will be stipulated at the time of the order of the Goods and shall become immediately due and payable.
 - 4.4 Time for payment for the Goods shall be of the essence and will be stated on the invoice, quotation or any other order forms. If no time is stated then payment shall be on delivery of the Goods.
 - 4.5 At the Seller's sole discretion, payment for approved Buyer's shall be due twenty (20) days following the end of the month in which a statement is posted to the Buyer's address or address for notices.
 - 4.6 A minimum payment of \$50 is required on all supplied artwork; the fee will be contra against final invoice. This fee will be non-refundable should the quotation not be accepted.
 - 4.7 Payment will be made by cash on delivery, or by cheque, or by bank cheque, or by credit card, or by direct credit, or by any other method as agreed to between the Buyer and the Seller.
 - 4.8 The Price shall be increased by the amount of any GST and other taxes and duties which may be applicable, except to the extent that such taxes are expressly included in any quotation given by the Seller.
- 5. Delivery Of Goods**
 - 5.1 Delivery of the Goods shall be made to the Buyer's address. The Buyer shall make all arrangements necessary to take delivery of the Goods whenever they are tendered for delivery, or delivery of the Goods shall be made to the Buyer at the Seller's address.
 - 5.2 Delivery of the Goods to a carrier, either named by the Buyer or failing such naming to a carrier at the discretion of the Seller for the purpose of transmission to the Buyer, is deemed to be a delivery of the Goods to the Buyer.
 - 5.3 The costs of carriage and any insurance which the Buyer reasonably directs the Seller to incur, shall be reimbursed by the Buyer (without any set-off or other withholding whatever) and shall be due on the date for payment of the Price. The carrier shall be deemed to be the Buyer's agent.
 - 5.4 The Buyer shall take delivery of the Goods tendered notwithstanding that the quantity so delivered shall be either greater or less than the quantity purchased provided that;
 - (a) such discrepancy in quantity shall not exceed 10%, and
 - (b) the Price shall be adjusted pro rata to the discrepancy.
- 5.5 The failure of the Seller to deliver shall not entitle either party to treat this contract as repudiated.
- 5.6 The Seller shall not be liable for any loss or damage whatever due to failure by the Seller to deliver the Goods (or any of them) promptly or at all.
- 6. Risk**
 - 6.1 If the Seller retains title to the Goods nonetheless all risk for the Goods passes to the Buyer on delivery.
 - 6.2 If any of the Goods are damaged or destroyed prior to title to them passing to the Buyer, the Seller is entitled, without prejudice to any of its other rights or remedies under these terms and conditions (including the right to receive payment of the balance of the Price for the Goods), to receive all insurance proceeds payable in respect of the Goods. This applies whether or not the Price has become payable under these terms and conditions. The production of these terms and conditions by the Seller is sufficient evidence of the Seller's rights to receive the insurance proceeds without the need for any person dealing with the Seller to make further enquiries.
- 7. Defects/Returns**
 - 7.1 The Buyer shall inspect the Goods on delivery and shall within twenty-four (24) hours of delivery notify the Seller of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Buyer shall afford the Seller an opportunity to inspect the Goods within a reasonable time following delivery if the Buyer believes the Goods are defective in any way. If the Buyer shall fail to comply with these provisions the Goods shall be conclusively presumed to be in accordance with the terms and conditions and free from any defect or damage.
 - 7.2 For defective Goods, which the Seller has agreed in writing that the Buyer is entitled to reject, the Seller's liability is limited to either (at the Seller's discretion) replacing the Goods or repairing the Goods provided that:
 - (a) the Buyer has complied with the provisions of clause 7.1;
 - (b) the Goods are returned at the Buyer's cost within three (3) days of the delivery date;
 - (c) the Seller will not be liable for Goods which have not been stored or used in a proper manner;
 - (d) the Goods are returned in the condition in which they were delivered and with all packaging material, brochures and instruction material in as new condition as is reasonably possible in the circumstances.
 - 7.3 Goods printed or made to special order, Buyer specification or non-catalogue items are under no circumstances acceptable for credit or return. Cancellation of orders for printed or special or non-catalogue items will definitely not be accepted, once these orders are in production.
 - 7.4 Whilst every care is taken by the Printer to carry out the instructions of the Buyer, it is the Buyers responsibility to undertake a final proof reading of the Goods. The Printer shall be under no liability whatever for any errors not corrected by the Buyer in the final proof reading. Should the Buyers alterations require additional proofs this shall be invoiced as an extra.
 - 7.5 The Seller is under no obligation to provide samples of Goods ordered other than by virtual (computerised) sample. Whilst every effort will be taken by the Seller to match virtual colours with physical colours, the Seller will take no responsibility for any variation between virtual sale samples and either the virtual sale sample displayed on the Buyer's computer and/or the final product. Should a physical sample be required this will be provided on request by the Buyer and will be charged for as an extra including return freight, the charge will be contra against final invoice.
 - 7.6 While every effort will be taken by the Seller to match PMS colours, the Seller will take no responsibility for any variation due to substrates, half tones and/or detailed graphics between sale samples (including but not limited to virtual or physical samples) and the final product.
 - 7.7 The Seller shall not be held liable for inks wearing off through general wear and tear.
 - 8. Warranty**
 - 8.1 Subject to the conditions of warranty set out in Clause 8.2 the Seller warrants that if any defect in any workmanship of the Seller becomes apparent and is reported to the Seller within three (3) months of the date of delivery (time being of the essence) then the Seller will either (at the Seller's sole discretion) repair the defect or remedy the workmanship.
 - 8.2 The conditions applicable to the warranty given by Clause 8.1 are:
 - (a) The warranty shall not cover any defect or damage which may be caused or partly caused by or arise through:
 - i) Failure on the part of the Buyer to properly maintain any Goods; or
 - ii) Failure on the part of the Buyer to follow any instructions or guidelines provided by the Seller; or
 - iii) Any use of any Goods otherwise than for any application specified on a quote or order form; or
 - iv) The continued use of any Goods after any defect becomes apparent or would have become apparent to a reasonably prudent operator or user; or
 - v) Fair wear and tear, any accident or act of God.
 - (b) The warranty shall cease and the Seller shall thereafter in no circumstances be liable under the terms of the warranty if the workmanship is repaired, altered or overhauled without the Seller's consent.
 - (c) In respect of all claims the Seller shall not be liable to compensate the Buyer for any delay in either replacing or repairing the workmanship/Goods or in properly assessing the Buyer's claim.
 - 8.3 For Goods not manufactured by the Seller, the warranty shall be the current warranty provided by the manufacturer of the Goods. The Seller shall not be bound by nor responsible for any term, condition, representation or warranty given by the manufacturer of the Goods.
 - 8.4 In the case of second hand Goods, the Buyer acknowledges that he has had full opportunity to inspect the same and that he accepts the same with all faults and that no warranty is given by the Seller as to the quality or suitability

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for any purpose and any implied warranty, statutory or otherwise, is expressly excluded. The Seller shall not be responsible for any loss or damage to the Goods, or caused by the Goods, or any part thereof however arising.

9. Default & Consequences Of Default

- 9.1 Interest on overdue invoices shall accrue from the date when payment becomes due daily until the date of payment at a rate of 2.5% compounding per calendar month and shall accrue at such a rate after as well as before any judgement.
- 9.2 If the Buyer defaults in payment of any invoice when due, the Buyer shall indemnify the Seller from and against all of the Seller's costs and disbursements including on a solicitor and own client basis and in addition all of the Seller's nominee's costs of collection.
- 9.3 Without prejudice to any other remedies the Seller may have, if at any time the Buyer is in breach of any obligation (including those relating to payment), the Seller may suspend or terminate the supply of Goods to the Buyer and any of its other obligations under the terms and conditions. The Seller will not be liable to the Buyer for any loss or damage the Buyer suffers because the Seller exercised its rights under this clause.
- 9.4 If any account remains unpaid at the end of the second month after supply of the Goods or Services the following shall apply: An immediate amount of the greater of \$20.00 or 10.00% of the amount overdue shall be levied for administration fees which sum shall become immediately due and payable in addition to the interest payable under clause 9.1 hereof.
- 9.5 In the event that:
- any money payable to the Seller becomes overdue, or in the Seller's opinion the Buyer will be unable to meet its payments as they fall due, or;
 - the Buyer becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors, or;
 - a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Buyer or any asset of the Buyer,
- then without prejudice to the Seller's other remedies at law:
- the Seller shall be entitled to cancel all or any part of any order of the Buyer which remains unperformed in addition to and without prejudice to any other remedies; and
 - all amounts owing to the Seller shall, whether or not due for payment, immediately become due and payable.

10. Title

- 10.1 It is the intention of the Seller and agreed by the Buyer that property in the Goods shall not pass until:
- The Buyer has paid all amounts owing for the particular Goods, and
 - The Buyer has met all other obligations due by the Buyer to the Seller in respect of all contracts between the Seller and the Buyer, and that the Goods, or proceeds of the sale of the Goods, shall be kept separate until the Seller shall have received payment and all other obligations of the Buyer are met.
- 10.2 Receipt by the Seller of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised and until then the Seller's ownership of rights in respect of the Goods shall continue.
- 10.3 It is further agreed that:
- Until such time as ownership of the Goods shall pass from the Seller to the Buyer the Seller may give notice in writing to the Buyer to return the Goods or any of them to the Seller. Upon such notice the rights of the Buyer to obtain ownership or any other interest in the Goods shall cease.
 - If the Buyer fails to return the Goods to the Seller then the Seller or the Seller's agent may enter upon and into land and premises owned, occupied or used by the Buyer, or any premises as the invitee of the Buyer, where the Goods are situated and take possession of the Goods, without being responsible for any damage thereby caused.

11. Consumer Guarantees Act 1993

- 11.1 This agreement is subject to the provisions of the Consumer Guarantees Act 1993 in all cases except where the Buyer is contracting within the terms of a trade/business (which cases are specifically excluded).

12. Security & Charge

- 12.1 Despite anything to the contrary contained herein or any other rights which the Seller may have howsoever:
- Where the Buyer and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Buyer and/or the Guarantor agree to mortgage and/or charge all of their joint and/or several interest in the said land, realty or any other asset to the Seller or the Seller's nominee to secure all amounts and other monetary obligations payable under the terms and conditions. The Buyer and/or the Guarantor acknowledge and agree that the Seller (or the Seller's nominee) shall be entitled to lodge where appropriate a caveat, which caveat shall be released once all payments and other monetary obligations payable hereunder have been met.
 - Should the Seller elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Buyer and/or Guarantor shall indemnify the Seller from and against all the Seller's costs and disbursements including legal costs on a solicitor and own client basis.
 - To give effect to the provisions of clause [11, 12.1(a) to (b)] inclusive hereof the Buyer and/or the Guarantor (if any) do hereby irrevocably nominate constitute and appoint the Seller or the Seller's nominee as the Buyer's and/or Guarantor's true and lawful attorney to execute mortgages and charges (whether registerable or not) including such other terms and conditions as the Seller and/or the Seller's nominee shall think fit in his/her/its/their absolute discretion against the joint and/or several interest of the Buyer and/or the Guarantor in any land, realty or asset in favour of the Seller and in the Buyer's and/or Guarantor's name as may be

necessary to secure the said Buyer's and/or Guarantor's obligations and indebtedness to the Seller and further to do and perform all necessary and other acts including instituting any necessary legal proceedings, and further to execute all or any documents in the Seller's absolute discretion which may be necessary or advantageous to give effect to the provisions of this clause.

13. Intellectual property

- 13.1 Where the Seller has designed or drawn Goods for the Buyer, then the copyright in those designs and drawings shall remain vested in the Seller, and shall only be used by the Buyer at the Seller's discretion.
- 13.2 The Buyer warrants that all designs or instructions to the Seller will not cause the Seller to infringe any patent, registered design or trademark in the execution of the Buyer's order.

14. Cancellation

- 14.1 The Seller may cancel these terms and conditions or cancel delivery of Goods and Services at any time before the Goods are delivered by giving written notice. On giving such notice the Seller shall promptly repay to the Buyer any sums paid in respect of the Price for those Goods. The Seller shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 14.2 Cancellation of a contract by the Buyer shall under no conditions relieve the Buyer of its contractual obligations. Where possible the Seller shall try and accommodate the Buyer's wishes subject to the following cancellation fees becoming immediately due and payable to the Seller:
- cancellation of branded Goods – A fee equal to 100% of the contract price; and
 - cancellation of unbranded Goods – A fee equal to the actual costs incurred by the Seller.

15. Privacy Act 1993

- 15.1 The Buyer and the Guarantor/s (if separate to the Buyer) authorises the Seller to:
- collect, retain and use any information about the Buyer, for the purpose of assessing the Buyer's creditworthiness or marketing products and services; and
 - to disclose information about the Buyer, whether collected by the Seller from the Buyer directly or obtained by the Seller from any other source, to any other credit provider or any credit reporting agency for the purposes of providing or obtaining a credit reference, debt collection or notifying a default by the Buyer.
- 15.2 Where the Buyer is a natural person the authorities under (clause 15.1) are authorities or consents for the purposes of the Privacy Act 1993.
- 15.3 The Buyer shall have the right to request the Seller for a copy of the information about the Buyer retained by the Seller and the right to request the Seller to correct any incorrect information about the Buyer held by the Seller.

16. Buyer's Disclaimer

- 16.1 The Buyer hereby disclaims any right to rescind, or cancel the contract or to sue for damages or to claim restitution arising out of any misrepresentation made to him by any servant or agent of the Seller and the Buyer acknowledges that he buys the Goods relying solely upon his own skill and judgement.

17. Contractual Remedies Act

- 17.1 The provisions of the Contractual Remedies Act 1979 shall apply to this contract as if section 15(d) of the Contractual Remedies Act which states that nothing in the Contractual Remedies Act shall affect the Sale of Goods Act 1908, were omitted from the Contractual Remedies Act 1979.

18. Unpaid Seller's Rights To Dispose Of Goods

- 18.1 In the event that:
- the Seller retains possession or control of the Goods; and
 - payment of the Price is due to the Seller; and
 - the Seller has made demand in writing of the Buyer for payment of the Price in terms of this contract; and
 - the Seller has not received the Price of the Goods, then, whether the title in the Goods has passed to the Buyer or has remained with the Seller, the Seller may dispose of the Goods and may claim from the Buyer the loss to the Seller on such disposal.

19. General

- 19.1 If any provision of these terms and conditions shall be invalid, void or illegal or unenforceable the validity existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 19.2 All Goods and Services supplied by the Seller are supplied subject to the laws of New Zealand and the Seller takes no responsibility for changes in the law that affect the Goods or Services supplied.
- 19.3 The Seller shall be under no liability whatsoever to the Buyer for any indirect loss and/or expense (including loss of profit) suffered by the Buyer arising out of a breach by the Seller of these terms and conditions.
- 19.4 In the event of any breach of this contract by the Seller the remedies of the Buyer shall be limited to damages. Under no circumstances shall the liability of the Seller exceed the Price of the Goods.
- 19.5 Neither party shall be liable for any default due to any act of God, terrorism, war, strike, lock out, industrial action, flood, storm or other event beyond the reasonable control of either party.
- 19.6 The Buyer shall not set off against the Price amounts due from the Seller.
- 19.7 The Seller may license or sub-contract all or any part of its rights and obligations without the Buyer's consent.
- 19.8 The Seller reserves the right to review these terms and conditions at any time and from time to time. If, following any such review, there is to be any change in such terms and conditions, that change will take effect from the date on which the Seller notifies the Buyer of such change.