

# Terms of Trade

The O'Brien Group Limited  
Conditions of Sale

## 1. GENERAL

1.1 For the purpose of these conditions of sale, the "Company" means The O'Brien Group Limited, the "Customer" means the customer named in the attached document "Goods" means bench tops including bench tops constructed from high pressure Laminate, Stonex, Engineers stone and other solid surfaces, sinks and other hardware, surface, partitions, sills and other componentry applications and other goods supplied by the Company and includes all the Goods described in invoices issued by the Company to the Customers, "GST" means goods and services tax, and "Services" means work performed or to be performed by the Company in relation to the goods.

1.2 All quotations for Goods and Services are subject to these conditions. Any Goods and Services supplied by the Company to the Customer will be supplied on these conditions only. These conditions constitute the entire agreement between the Customer and the Company and take precedence over any terms which may be offered by the Customer. The only circumstance where any variation to these conditions will apply is where the Company has expressly agreed in writing to that variation.

## 2. QUOTATIONS

Unless otherwise stated in writing by the Company.

(a) quotations will be open for acceptance for 90 days from the date of the quotation;

(b) where a quotation is based on quantities, measurements, specifications or other information provided by the Customer, any cost for additional work or Goods required as a result of any inaccuracy in those quantities, measurements, specifications or information will be for the Customer's account;

(c) GST is to be added to the price quoted.

## 3. ORDERS AND ORDER CANCELLATION

3.1 All orders are subject to acceptance by the Company.

3.2 Cancellation of or variations to an order may be accepted at the sole discretion of the Company, on such terms as the Company may specify.

## 4. PRICE

4.1 Subject to clauses 2 and 7.2, the prices of the Goods and Services will be the price quoted to, and accepted by, the customer. If no price has been quoted to, or accepted by, the Customer, the price of the Goods will be the price current on the date the Goods are delivered to the Customer and the price of the Services will be the price current on the date of completion of the Services, unless otherwise agreed writing by the Company.

4.2 Prices exclude any amount payable in respect of GST (if any), which will be paid by the Customer in addition to the price.

## 5. PAYMENT

5.1 If the Company is to perform Services, the Company may invoice each month in respect of the Services performed and the Goods delivered during the preceding monthly period.

5.2 Unless otherwise agreed, payment of all amounts payable by the Customer will be made in full no later than the 20th of the month following the date of the relevant invoice. However, the Company may require payment for any Goods or Services in cash before such Goods are delivered or Services performed.

5.3 Subject to clauses 5.2 and 5.4, payment must be by cheque, electronic funds transfer, cash or such other means as may be agreed by the Company before the payment is made.

5.4 The Company may, at any time, require payment by letter of credit, bank cheque or post dated cheque or secure payment for Goods and Services by way of a general security deed, an assignment of debt, an instrument by way of security, a mortgage or agreement to a mortgage, or in any other manner whatsoever.

5.5 The Customer may not deduct or withhold any amount (whether by way of set-off, counterclaim or otherwise) from any money owing to the Company.

5.6 Any payment received by the Company (or any amount deducted or withheld by the Company under clause 5.7) may be applied in reduction of any amount owing to the Company, as determined by the Company.

5.7 The Company may deduct or withhold any amount (whether by way of set-off, counterclaim or otherwise) from any money owing by the Company to the Customer on any account whatsoever.

5.8 If full payments not made by the due date for payment, the customer will pay, at the Company's discretion (and without prejudice to any other rights or remedies the Company may have), on demand, default interest on any amount outstanding at a rate equal to 30% above the current base lending rate from time to time set by the Company's bankers, from the date when payment is due until the date when payment is actually made and all expenses and costs (including legal costs as between solicitor and client) incurred by the Company in connection with the Company recovering or attempting to recover any overdue amount.

## 6. DELIVERY

6.1 Unless otherwise agreed, the Company will arrange delivery of the Goods. Delivery may be by installment.

6.2 Unless otherwise agreed by the Company prior to delivery, the price of the Goods excludes the costs of delivery of the Goods, which will be paid by the Customer in addition to the price.

6.3 If the price of the Goods includes the costs of delivery, the following conditions apply, unless otherwise agreed by the Company prior to delivery:

(a) in respect of Goods delivered to a delivery point in New Zealand, the price of the Goods includes the costs of delivery of the Goods by the usual methods of transportation used by the company between the hours of 7.30am and 5pm Monday to Friday (excluding statutory holidays). The Company may, if the Customer requests, arrange Goods to be delivered by other means or that other times but will be entitled to charge the Customer for any additional costs the Company may incur;

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- (b) in respect of Goods delivered to a delivery point outside New Zealand, the price of the Goods includes the cost of delivery of the Goods by the usual route and methods of transportation used by the Company. The Company may, if the Customer requests, arrange Goods to be delivered by other means but will be entitled to charge the Customer for any additional costs the Company may incur.
- 6.4 The Company will endeavor to have Goods delivered on the agreed delivery dates but will not be liable for late delivery. Late delivery does not entitle the Customer to cancel or any part of the contract.
- 6.5 Delivery will be deemed to have been made when Goods arrive at the delivery point agreed with the Customer if the Customer is to arrange delivery of the Goods, when the Goods are available for collection by the Customer. The Customer or its authorised representative must sign the Company's copy of the delivery docket or packing slip before the Goods are unloaded or Collected.
- 6.6 All claims for errors in delivery or for Goods damaged in transit must be made to the Company within seven days of delivery and in accordance with the procedures advised by the Company from time to time.
- 6.7 Where the Company arranges delivery of the Goods, the Customer will ensure, at its own cost, that all agreed delivery points have the mechanical means and labour to unload the Goods promptly and have suitable access and area for unloading.
- 6.8 If the Customer fails or refuses to take delivery of the Goods at an agreed delivery time, the Company may (without limiting any other rights or remedies the Company may have) charge the Customer for any expenses or additional costs incurred by the Company as a result of delay.
7. INSTALLATION
- 7.1 If the Company is to install the Goods, the Customer must ensure, at its own cost, that:
- the site is prepared to the satisfaction of the Company;
  - the company (and its authorised personnel) has the access to the site that the Company reasonably requires;
  - the Company has the facilities and equipment that it reasonably requires to carry out the installation including, without limitation, 230 volt AC electric power;
- 7.2 For the avoidance of doubt, and with out limiting clause 2(b), where a quotation is based on work to be performed, any costs for work considered by the Company to be additional to the work quoted for will be for the Customer's account.
- 7.3 If, in the opinion of the Company, the Customer fails to comply with clause 7.1, the Company may (without limiting any other rights it might have) charge the Customer for any expenses or additional costs incurred by the Company as a result of such failure.
8. OWNERSHIP RISK
- 8.1 Ownership of any Goods supplied by the Company will not pass to the Customer until all amounts owing by the Customer to the Customer in respect of those Goods and all the other Goods supplied by the Customer have been received by the Company.
- 8.2 Until ownership passes to the Customer, the Goods supplied are held by the Customer for the Company as bailee and, if required, the Customer will store the goods so that it is clear they belong to the Company.
- 8.3 If the Customer wishes to resell any Goods before ownership passes, the Customer may do so only by way of bona fide sale in the ordinary course of business and as the agent of the Company, but the Customer shall not represent to any other person that the Customer is acting for, or has any authority to bind, the Company. The Customer shall account to the Company for the proceeds of any sale of the Goods.
- 8.4 Risk in the Goods will pass to the Customer on delivery of the Goods.
9. RETURNS
- 9.1 Subject to clauses 6.6, 12.4 and 12.5, Goods may only be returned to the Company within 14 days of the date of invoice for those Goods if:
- the Goods form part of the Company's stock in trade and are not custom made, and
  - the condition of the Goods has not deteriorated, in the Company's opinion, and subject to the following:
    - the Customer pays for the cost of returning the Goods, and
    - the Customer provides evidence of purchase from the Company to the Company's satisfaction.
- 9.2 Where Goods are returned in accordance with clause 9.1, the Company will give a credit to the Customer of at least 90% of the price of the Goods.
10. PERSONAL PROPERTY SECURITIES ACT
- 10.1 The Customer acknowledges that these conditions constitute a security agreement for the purpose of sections 36 of the Personal Property Securities Act 1999 ("PPSA") and that a security interest exists in all Goods (and their proceeds) previously supplied by the Company the Customer (if any) and in all future Goods (and their proceeds).
- 10.2 The Customer is to execute documents and do such further acts as may be required by the Company to register the security interest granted to the Company under these conditions under the PPSA. If required by the Company, the Customer will promptly procure the acknowledgment of any third party to the Company's interest in the goods.
- 10.3 Until ownership of the Goods passes, the Customer waives its right under the PPSA.
- to receive a copy of any verification statement;
  - to receive a copy of any financing change statement,
  - to receive any notice the Company intends to sell the Goods or to retain the Goods on enforcement of the security interest (as defined in PPSA) granted to the Company under these conditions;
  - to object to a Company proposal to retain the Goods in satisfaction of any obligation owed by the customer to the Company;

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- (e) to receive a statement of the account on sale of the Goods;
  - (f) to redeem the Goods; and
  - (g) where any Goods become an accession, as defined in the PPSA, to not have any Goods damaged when the Company removes the accession, to receive notice of removal of the accession and to apply to the court for an order concerning the removal of an accession.
- 10.4 Until ownership of the Goods passes, the Customer must not give to the Company a written demand or allow any other person to give the Company a written demand requiring the Company to register a financing change statement under the PPSA, or enter into or allow any other person to enter into the register of personal property securities a financing change statement under the PPSA.
- 10.5 The Customer acknowledges that it has received value as at the date of first delivery of the Goods and has not agreed to postpone the time for attachment of the security interest (as defined in PPSA) granted to the Company under these conditions.
11. CHANGE OF TRADING ENTRY AND CUSTOMER DETAILS The Customer must provide the Company with at least 14 days prior written notice of any change of name, address, contact details or legal status. Unless the Company has received and accepted an application for a trade credit account in the name of a company, the Customer named in the attached document (in the case of a Customer who is not a company) will be liable for the Goods notwithstanding that the order for the Goods was made by a company.
12. WARRANTIES
- 12.1 The Company warrants the Goods manufactured by the Company will be free from defects in materials or workmanship and will substantially conform with the Company's specifications (if any). BUT this warranty will not apply:
- (a) unless a written claim (other than a claim covered by clause 6.6, which will be dealt with under clause 6.6) is received by the Company within six months of delivery of the Goods to which the claim relates;
  - (b) unless the Company is given the opportunity to inspect the Goods immediately after the defect is discovered;
  - (c) if the Goods have been repaired by any person not authorised by the Company to do such repairs;
  - (d) if the Goods are used for any purpose other than the purpose for which they are intended;
  - (e) if the Goods have been modified or incorrectly stored, handled, installed or maintained;
  - (f) if the instructions as to use, installation or maintenance of the Goods as contained in current product data produced by the Company have not been adhered to (it being the responsibility of the Customer to obtain that information);
  - (g) to any Goods which have been sold by the Company as seconds, downgrades or otherwise outside the standard specifications for those Goods.
- 12.2 If the Customer is a consumer under the Customer Guarantees Act 1993 (the "Act"):
- (a) and is acquiring or holding itself out of acquiring the Goods for a business purpose, the Act will not apply, and
  - (b) is acquiring or holding itself out as acquiring the Services for a business purpose, the Act will not apply;
  - (c) the Company does not undertake that facilities for repair and parts for the Goods will be available.
- 10.3 If the Customer is acquiring the Goods for the purpose or re-supplying them (in the form in which they were delivered or otherwise) in trade, the Customer will:
- (a) include in its conditions of sale a clause to the effect that the Act will not supply where a customer of the Customer acquires or holds itself out as acquiring the Goods for a business purpose;
  - (b) notify its customers of the effect of clause 12.3(a);
  - (c) take reasonable action to notify its customers at or before the time the Goods are supplied to such customers that the Company does not undertake that repair facilities and parts will be available for the Goods; and
  - (d) indemnify the Company against all losses, costs, damages or liabilities which the Company may incur or be liable to pay arising out of the Customer's failure to take the action required under this clause 12.3.
- 12.4 Subject to clause 12.5 and to any express warranties given by the Company to the Customer in writing:
- (a) all warranties (other than the warranty contained in clause 12.1), descriptions, representations, terms and conditions (other than these conditions of sale) whether implied by law, trade, custom or otherwise are, and all other liability of the Company, whether in tort (including negligence), contract, under statute or otherwise is, expressly excluded to the fullest extent permitted by law;
  - (b) insofar as the Company may be liable notwithstanding clause 12.4(a), the total liability of the Company for any loss, damage or injury arising directly or indirectly from the defect in or non-compliance of any Goods, any failure in respect of the Services or any other breach of the Company's obligations to the Customer (including, without limitation, any breach of the warranty in clause 12.1) is, to the extent permitted by law, limited to, at the Company's option:
    - (i) the price of the Goods or Services complained of; or
    - (ii) the cost of repairing or replacing the defective Goods or remedying the failure or breach; or
    - (iii) the actual loss or damage suffered by the Customer,

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- (c) except where statute expressly requires otherwise, the Company will not be liable in any event for any loss of profits or any consequential, indirect or special damage, loss or injury of any kind suffered by the Customer or any other person;
  - (d) while the Company will make every effort to ensure the accuracy of any advice, recommendation, information or assistance provided by the Company in relation to the service or the Goods or their use or application, to the extent permitted by law, the Company does not accept any liability or responsibility in respect of such advice.
- 12.5 Subject to clause 12.2, nothing in these conditions will effect any rights a customer (as defined in the Act) may have under the Act.
12. CONTAINERS AND PACKAGING
- 13.1 When a returnable container, case, cage or crate is use for the delivery of Goods, the Customer will pay for the cost of the container, case, cage or crate. The cost will be noted on the relevant invoice, and will be credited when the container, case, cage or crate is returned (at the Customer's cost) to the Company (st the premises from which the Goods were despatched or collected) All containers, cases, cages or crates used for the delivery of the Goods will remain the property of the Company.
- 13.2 When a non-returnable container, case or crate is used for the delivery of Goods, the Customer will be responsible for disposing, at its own cost, of all materials used in the packaging or delivery of Goods.
14. TRADEMARKS  
The Customer will use the Company's trade margin accordance with the terms and conditions advised by the Company from time to time.
15. OTHER RIGHTS OF THE COMPANY  
If:
- (a) any amount payable by the Customer to the Company is overdue, or the Customer fails to meet any other obligation to the Company (whether in relation to the supply of Goods or Services or otherwise), or in the Company's opinion the Customer is likely to be unable to meet its payment or other obligations to the Company; or
  - (b) the Customer becomes bankrupt, insolvent, has a receiver appointed in respect of all or some of the assets, make or is likely to make an arrangement wit its creditors, has a liquidator (provisional or otherwise) appointed, is placed under statutory or official management or any equivalent or analogous event occurs under the law of any jurisdiction in which the Customer is incorporated, domiciled; resident or carries on business, or
  - (c) the ownership or effective control of the Customer is transferred or the nature of the Customer's business is materially altered; then:
    - (i) the Company may cancel all or any part of any contract or contracts with the Customer which remains unperformed, in addition to and without prejudice to its other rights or remedies; and
    - (ii) all amounts pwing to the Company whether due for payment or not, will immediately become due and payable; end
    - (iii) the Company may remove any Goods in the Customer's possession or control (including any Goods that have become an accession under the PPSA) and dispose of them or retain then for its own benefit and for that purpose the Company may, subject to the Credit (Repossession) Act 1997, without notice, enter directly or by its agents on any premises where i believes Goods may be stored, without in anyway being liable to any person.
16. GOVERNING LAW
- 16.1 These conditions will be governed by New Zealand law and the Customer agrees to submit to the exclusive jurisdiction of the New Zealand courts.
- 16.2 The application of the United Nations Convention on contracts for the International Sale of Goods is expressly excluded.
17. FORCE MAJEURE  
Where the Company is unable, wholly or in part, to carry out any obligation under these conditions because of an event or circumstance beyond its reasonable control (" Force Majeure Event") that obligation is suspended so far as it is affected by the Force Majeure Event, during its continuance.
18. AMENDMENTS  
The Company may vary these conditions from time to time by notice in writing to the Customer.
19. MISCELLANEOUS
- 19.1 If at any time the Company does not enforce any of these conditions or grants the Customer time or other indulgence, the Company will not be construed as having waived that condition or its rights to later enforce that or any other condition.
- 19.2 Where any provision of these conditions is rendered void, unenforceable or otherwise ineffective by operation of law, that will not effect the enforceability or effectiveness of any other provision of these conditions.
- 19.3 The Customer may not assign or sub-contract any of its rights or obligations under these conditions, except with the prior written consent of the Company. Any consent under this clause may be given subject to such conditions as the Company require.