

ESSENTIAL DESIGN LIMITED

TERMS OF TRADE AUGUST 2007



metroLAW

1. DEFINITIONS

- 1.1. "CUSTOMER" shall mean the individual, company, partnership or other entity engaging the services of **ESSENTIAL DESIGN LIMITED** and any person acting on behalf of the **CUSTOMER**.
- 1.2. "ESSENTIAL DESIGN" shall mean **ESSENTIAL DESIGN LIMITED**, or any contractors, agents or employees thereof.
- 1.3. "PRICE" shall mean the cost of the services to the **CUSTOMER** as agreed between **ESSENTIAL DESIGN** and the **CUSTOMER** subject to these terms and conditions and includes all charges **ESSENTIAL DESIGN** is required to pay to others on the **CUSTOMERS** behalf.
- 1.4. "SERVICES" shall mean all products, goods, services, advice, concepts, layouts and designs, printing and art work created by **ESSENTIAL DESIGN** in the course of acting for the **CUSTOMER** and shall include without limitation all associated **SERVICES** and all charges for labour, freight hire charges, insurance charges, or any fee or charge associated with the supply of the **SERVICES** by **ESSENTIAL DESIGN** to the **CUSTOMER**.

2. ACCEPTANCE

- 2.1. Any instructions received by **ESSENTIAL DESIGN** from the **CUSTOMER** for the supply of **SERVICES** shall constitute a binding contract on, and acceptance by the **CUSTOMER** of, the terms and conditions contained herein.

3. COLLECTION AND USE OF INFORMATION

- 3.1. The **CUSTOMER** authorises **ESSENTIAL DESIGN** to collect, retain and use any information about the **CUSTOMER**, for the purpose of assessing the credit worthiness of the **CUSTOMER**, enforcing any rights under this contract, or marketing any **SERVICES** provided by **ESSENTIAL DESIGN** to the **CUSTOMER** or any other party.
- 3.2. The **CUSTOMER** authorises **ESSENTIAL DESIGN** to communicate to the **CUSTOMER** by email any advertisement or offer in relation to the services of **ESSENTIAL DESIGN** in the future.
- 3.3. The **CUSTOMER** authorises **ESSENTIAL DESIGN** to disclose any information obtained to any person reasonably necessary for the purposes set out in clause 3.1.
- 3.4. Where the **CUSTOMER** is a natural person the authorities under clauses 3.1 and 3.3 are authorities or consents for the purposes of the Privacy Act 1993.

3.5. The **CUSTOMER** agrees not to disclose any information concerning the **SERVICES**, pricing, business affairs or other trade secrets regarding the **SERVICES** of **ESSENTIAL DESIGN**.

4. **PRICE**

4.1. Unless specified in writing to the contrary any indication of **PRICE** for the provision of **SERVICES** by **ESSENTIAL DESIGN** is by way of an estimate only and shall not be binding on **ESSENTIAL DESIGN**.

5. **QUOTATION**

5.1. Where a **PRICE** is given by Quotation by **ESSENTIAL DESIGN** for **SERVICES**:

- (a) Unless otherwise agreed the quotation shall be valid and open for acceptance by the **CUSTOMER** for twenty one (21) days from the date of issue; and
- (b) The quotation shall be exclusive of goods and services tax unless specifically stated to the contrary;
- (c) Where **SERVICES** are required in addition to the quotation the **CUSTOMER** agrees to pay for the additional cost of such **SERVICES**.
- (d) The **PRICE** may be increased by the amount of any reasonable increase in the cost of supply of the **SERVICES** between the date of the contract and delivery of the **SERVICES**.
- (e) No Quotation shall be given other than in writing.

6. **PAYMENT**

6.1. Payment for **SERVICES** shall be made in accordance with the following:

- (a) Concept Stage Invoice – on completion of initial sketches.
- (b) Interim Invoice on a time engaged basis, monthly.
- (c) Final Invoice on printing.

6.2. Where agreed by **ESSENTIAL DESIGN** in writing following a credit application, **ESSENTIAL DESIGN** may extend credit to the **CUSTOMER** wherein payment is to be made in full within seven (7) days of supply, or by the 20th of the month following the date of the invoice (“the due date”), depending on the terms specified by **ESSENTIAL DESIGN**.

6.3. If no other terms are specified then payment is due within 7 days of supply.

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- 6.4. Any expenses, disbursements and legal costs incurred by **ESSENTIAL DESIGN** in the enforcement of any rights contained in this contract shall be paid by the **CUSTOMER**, including any solicitor's fees on an own client basis and debt collection agency fees,
 - 6.5. Receipt of a cheque, bill of exchange, or other negotiable instrument shall not constitute payment until such negotiable instrument amount is available to **ESSENTIAL DESIGN** as cleared funds.
 - 6.6. A deposit of between 10% and 50% of the **PRICE** may be required at the discretion of **ESSENTIAL DESIGN** before **ESSENTIAL DESIGN** commences any work.

7. **PAYMENT ALLOCATION**

- 7.1. **ESSENTIAL DESIGN** may in its discretion allocate any payment received from the **CUSTOMER** towards any invoice that **ESSENTIAL DESIGN** determines and may do so at the time of receipt or at any time afterwards and on default by the **CUSTOMER** may reallocate any payments previously received and allocated.

8. **INTELLECTUAL PROPERTY**

- 8.1. **ESSENTIAL DESIGN** shall retain ownership of and all rights in, the intellectual property created by it in any work undertaken for the **CUSTOMER** in accordance with Clause 9 below, until such time as **ESSENTIAL DESIGN** has been paid in full, when those rights shall pass to the **CUSTOMER**.
- 8.2. The **CUSTOMER** authorises **ESSENTIAL DESIGN** to retain copies of all the intellectual property referred to above, stored in whatever medium **ESSENTIAL DESIGN** considers appropriate and specifically authorises **ESSENTIAL DESIGN** to use that intellectual property for its own promotional purposes.
- 8.3. Any intellectual property that is not paid for by a **CUSTOMER** or does not form part of the **SERVICES** presented to the **CUSTOMER** remains the property of **ESSENTIAL DESIGN** and **ESSENTIAL DESIGN** shall retain all rights in that intellectual property.
- 8.4. The **CUSTOMER** hereby authorises the use of, including but not limited to the reproduction, alteration, and storage of the intellectual property (in any medium) provided by it, whether at the request of **ESSENTIAL DESIGN** or not, to **ESSENTIAL DESIGN** for any purpose connected to the **SERVICES**.
- 8.5. The **CUSTOMER** warrants that any intellectual property (designs, trademarks, logos) provided to **ESSENTIAL DESIGN** for use in the provision of the **SERVICES** by **ESSENTIAL DESIGN** is the property of the **CUSTOMER**, or that the **CUSTOMER** has

sufficient rights therein, or licence(s) for the use of, to enable the **CUSTOMER** to authorise **ESSENTIAL DESIGN** to make use of (including altering) that intellectual property.

- 8.6. The **CUSTOMER** holds harmless and indemnifies **ESSENTIAL DESIGN** against any claim whether in contract or tort, for damages or otherwise, that arises out of the use of the intellectual property.

9. TITLE AND SECURITY (PERSONAL PROPERTY SECURITIES ACT 1999)

- 9.1. Title in any intellectual property supplied by **ESSENTIAL DESIGN** passes to the **CUSTOMER** only when the **CUSTOMER** has made payment in full for all intellectual property provided by **ESSENTIAL DESIGN** and of all other sums due to **ESSENTIAL DESIGN** by the **CUSTOMER** on any account whatsoever. Until all sums due to **ESSENTIAL DESIGN** by the **CUSTOMER** have been paid in full, **ESSENTIAL DESIGN** has a security interest in all intellectual property.
- 9.2. If the intellectual property is attached, fixed, or incorporated into any property of the **CUSTOMER**, by way of any manufacturing, printing or assembly process or any third party, title in the intellectual property shall remain owned by **ESSENTIAL DESIGN** until the **CUSTOMER** has made payment for all intellectual property, and where intellectual property is mixed with other property so as to be part of or a constituent of any new intellectual property, title to that new intellectual property shall be deemed to be assigned to **ESSENTIAL DESIGN** as security for the full satisfaction by the **CUSTOMER** of the full amount owing between **ESSENTIAL DESIGN** and the **CUSTOMER** .
- 9.3. The **CUSTOMER** hereby gives an irrevocable authority to **ESSENTIAL DESIGN** or any person appointed by **ESSENTIAL DESIGN** for that purpose, to enter any premises occupied by the **CUSTOMER** or on which intellectual property are situated at any reasonable time after default by the **CUSTOMER** or before default if **ESSENTIAL DESIGN** believes on reasonable grounds that a default is likely, or that the intellectual property is at risk (as "risk" is defined in the Credit Repossessions Act) and to remove and repossess any intellectual property and any other property to which intellectual property are attached or in which intellectual property are incorporated.
- 9.4. **ESSENTIAL DESIGN** shall not be liable for any costs, damages, expenses or losses incurred by the **CUSTOMER** or any third party as a result of this action, nor liable in contract or in tort or otherwise in any way whatsoever unless by statute such liability cannot be excluded.
- 9.5. **ESSENTIAL DESIGN** may either resell any repossessed intellectual property and credit the **CUSTOMER** account with the net proceeds of sale (after deduction of all repossession,

storage, selling recovery and other costs) or may retain any repossessed intellectual property and credit the **CUSTOMER** account with the invoice value thereof less such sum as **ESSENTIAL DESIGN** reasonably determines on account of wear and tear, depreciation, obsolescence, loss or profit and recovery costs.

9.6. Where intellectual property is retained by **ESSENTIAL DESIGN** pursuant to clause 9.5 the **CUSTOMER** waives the right to receive notice under s.120 of the Personal Property Securities Act 1999 ("PPSA") and to object under s.121 of the PPSA.

9.5 The following shall constitute defaults by the **CUSTOMER**:

- (a) Non-payment of any sum by the due date.
- (b) The **CUSTOMER** intimates that it will not pay any sum by the due date,
- (c) Any intellectual property seized by any other creditor of the **CUSTOMER** or any other creditor intimates that it intends to seize intellectual property.
- (d) Any intellectual property in the possession of the **CUSTOMER** is materially damaged while any sum due from the **CUSTOMER** to **ESSENTIAL DESIGN** remains unpaid.
- (e) The **CUSTOMER** or a Guarantor is bankrupted or put into liquidation or a receiver is appointed to any of the **CUSTOMER** assets or a landlord distrains against any of the **CUSTOMER** assets.
- (f) A Court judgment is entered against the **CUSTOMER** or a Guarantor and remains unsatisfied for seven (7) days.

10. **AGENCY**

10.1. The **CUSTOMER** authorises **ESSENTIAL DESIGN** to contract either as principal or agent with third parties for the provision of **SERVICES** that are the matter of this contract.

10.2. Where **ESSENTIAL DESIGN** enters into a contract of the type referred to in clause 10.1 it shall be read with and form part of this agreement and the **CUSTOMER** agrees to pay any amounts due under that contract.

11. **LIABILITY**

11.1. The Consumer Guarantees Act 1993, the Fair Trading Act 1986 and other statutes may imply warranties or conditions or impose obligations upon **ESSENTIAL DESIGN** which can by law (or which can to a limited extent by law) be excluded or modified. In respect of any such implied warranties, conditions or terms imposed on **ESSENTIAL DESIGN**, **ESSENTIAL DESIGN'S** liability shall, where it is allowed, be excluded or if not able to be excluded only apply to the minimum extent required by the relevant statute.

11.2. **ESSENTIAL DESIGN** shall not be liable for:

- (a) Any loss or damage of any kind whatsoever including consequential loss whether suffered or incurred by the **CUSTOMER** or another person and whether in contract or tort (including negligence) or otherwise and irrespective of whether such loss or damage arises directly or indirectly from **SERVICES** provided by **ESSENTIAL DESIGN** to the **CUSTOMER**; and
- (b) The **CUSTOMER** shall indemnify **ESSENTIAL DESIGN** against all claims and loss of any kind whatsoever however caused or arising and without limiting the generality of the foregoing of this clause whether caused or arising as a result of the negligence of **ESSENTIAL DESIGN** or otherwise, brought by any person in connection with any matter, act, omission, or error by **ESSENTIAL DESIGN** its agents or employees in connection with the **SERVICES**.

12. **CONSUMER GUARANTEES ACT**

12.1. The guarantees contained in the Consumer Guarantees Act 1993 are excluded where the **CUSTOMER** acquires **SERVICES** from **ESSENTIAL DESIGN** for the purposes of a business in terms of sections 2 and 43 of that Act.

13. **PERSONAL GUARANTEE OF COMPANY DIRECTORS**

13.1. If the **CUSTOMER** is a company, the director(s) of the **CUSTOMER**, in consideration for **ESSENTIAL DESIGN** agreeing to supply **SERVICES** to the **CUSTOMER**, agree that they are liable in their personal capacity, and if the **CUSTOMER** has more than one director then jointly and severally liable, as principal debtors to **ESSENTIAL DESIGN** for the payment of any and all monies owed by the **CUSTOMER** to **ESSENTIAL DESIGN**.

13.2. The directors hereby also indemnify **ESSENTIAL DESIGN** against non-payment by the **CUSTOMER** including all costs and fees associated with any debt recovery action taken by **ESSENTIAL DESIGN** including but not limited to solicitor client costs on an own client basis.

13.3. Any personal liability of a director(s) of a **CUSTOMER** shall not exclude the **CUSTOMER** in any way whatsoever from the liabilities and obligations contained in this contract.

14. **CANCELLATION**

14.1. **ESSENTIAL DESIGN** shall, without any liability, and without any prejudice to any other right it has in law or equity, have the right by notice to suspend or cancel in whole or in part any contract for the supply of **SERVICES** to the **CUSTOMER** if the **CUSTOMER** fails to pay

any money owing after the due date or the **CUSTOMER** commits an act of bankruptcy as defined in section 19 of the insolvency Act 1967.

- 14.2. Any cancellation or suspension of this agreement shall not affect **ESSENTIAL DESIGN** claim for money due at the time of cancellation or suspension or for damages for any breach of any terms of this contract or the **CUSTOMER** obligations to **ESSENTIAL DESIGN** under this contract.

15. MISCELLANEOUS

- 15.1. **ESSENTIAL DESIGN** shall not be liable for delay or failure to perform its obligations if the cause of the delay or failure is beyond its control.
- 15.2. Failure by **ESSENTIAL DESIGN** to enforce any of the terms and conditions contained in this contract shall not be deemed to be a waiver of any of the rights or obligations **ESSENTIAL DESIGN** has under this contract.
- 15.3. Where these terms and conditions of trade are at variance with any discussions, correspondence the order or any instructions from the **CUSTOMER** the terms and conditions contained in this contract shall prevail.
- 15.4. The terms and conditions contained in this contract may be varied by agreement in writing only.

16. SEVERABILITY

- 16.1. If any provision or part of a provision of this contract is held invalid, unenforceable or illegal for any reason, this contract and any remainder of the provision shall remain otherwise in full force apart from that part of the provision which shall be deemed deleted.

17. JURISDICTION

- 17.1. The parties agree that this contract shall be governed by and construed in accordance with the laws of New Zealand and subject to the non exclusive jurisdiction of the New Zealand Courts at the court of competent authority closest to the registered office of **ESSENTIAL DESIGN**.