

Murray Sinclair Limited T/A P & M Fireplaces – Terms & Conditions of Trade

1. **Definitions**
- 1.1 **Contract** means the terms and conditions contained herein, together with any quotation, order, invoice or other document or amendments expressed to be supplemental to this Contract.
- 1.2 **P & M Fireplaces** means Murray Sinclair Limited T/A P & M Fireplaces, its successors and assigns.
- 1.3 **Customer** means the persons, entities or any person acting on behalf of and with the authority of the Customer requesting P & M Fireplaces to provide the Works as specified in any proposal, quotation, order, invoice or other documentation, and:
- (a) if there is more than one Customer, is a reference to each Customer jointly and severally; and
- (b) if the Customer is a partnership, it shall bind each partner jointly and severally; and
- (c) if the Customer is a part of a Trust, shall be bound in their capacity as a trustee; and
- (d) includes the Customer's executors, administrators, successors and permitted assigns.
- 1.4 **Works** means all Works (including consultation, manufacturing and/or installation services) or Materials supplied by P & M Fireplaces to the Customer at the Customer's request from time to time (where the context so permits the terms 'Works' or 'Materials' shall be interchangeable for the other).
- 1.5 **Worksite** means the address nominated by the Customer to which the Materials are to be supplied by P & M Fireplaces.
- 1.6 **Intended Use** means a product and the use thereof, for which the product is intended to be, or is reasonably likely to be, associated with the Works.
- 1.7 **Non-Conforming Building Product** means building products that are regarded as Non-Conforming for an Intended Use if, when associated with a building:
- (a) the product is not, or will not be, safe; or
- (b) does not, or will not, comply with the relevant regulatory provisions; or
- (c) the product is not, or is not capable of performing, for the use to the standard it is represented to conform by or for a person in the chain of responsibility for the product.
- 1.8 **Cookies** means small files which are stored on a user's computer. They are designed to hold a modest amount of data (including Personal Information) specific to a particular client and website, and can be accessed either by the web server or the client's computer. If the Customer does not wish to allow Cookies to operate in the background when using P & M Fireplaces' website, then the Customer shall have the right to enable / disable the Cookies first by selecting the option to enable / disable provided on the website, prior to making enquiries via the website.
- 1.9 **Price** means the Price payable (plus any Goods and Services Tax ("GST") where applicable) for the Works as agreed between P & M Fireplaces and the Customer in accordance with clause 5 below.
2. **Acceptance**
- 2.1 The Customer is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Customer places an order for or accepts delivery of any Works.
- 2.2 In the event of any inconsistency between the terms and conditions of this Contract and any other prior document or schedule that the parties have entered into, the terms of this Contract shall prevail.
- 2.3 Any amendment to the terms and conditions contained in this Contract may only be amended in writing by the consent of both parties.
- 2.4 The Customer acknowledges and accepts that:
- (a) the supply of Works on credit shall not take effect until the Customer has completed a credit application with P & M Fireplaces and it has been approved with a credit limit established for the account; and
- (b) in the event that the supply of Works requested exceeds the Customer's credit limit and/or the account exceeds the payment terms, P & M Fireplaces reserves the right to refuse delivery.
- 2.5 Electronic signatures shall be deemed to be accepted by either party providing that the parties have complied with Section 226 of the Contract and Commercial Law Act 2017 or any other applicable provisions of that Act or any Regulations referred to in that Act.
3. **Errors and Omissions**
- 3.1 The Customer acknowledges and accepts that P & M Fireplaces shall, without prejudice, accept no liability in respect of any alleged or actual error(s) and/or omission(s):
- (a) resulting from an inadvertent mistake made by P & M Fireplaces in the formation and/or administration of this Contract; and/or
- (b) contained in/omitted from any literature (hard copy and/or electronic) supplied by P & M Fireplaces in respect of the Works.
- 3.2 In the event such an error and/or omission occurs in accordance with clause 3.1, and is not attributable to the negligence and/or willful misconduct of P & M Fireplaces, the Customer shall not be entitled to treat this Contract as repudiated nor render it invalid.
4. **Change in Control**
- 4.1 The Customer shall give P & M Fireplaces not less than fourteen (14) days prior written notice of any proposed change of ownership of the Customer and/or any other change in the Customer's details (including but not limited to, changes in the Customer's name, address, contact phone or fax numbers, change of trustees, or business practice). The Customer shall be liable for any loss incurred by P & M Fireplaces as a result of the Customer's failure to comply with this clause.
5. **Price and Payment**
- 5.1 At P & M Fireplaces' sole discretion the Price shall be either:
- (a) as indicated on invoices provided by P & M Fireplaces to the Customer in respect of Works performed or Materials supplied; or
- (b) the Customer's quoted Price (subject to clause 5.2) which shall be binding upon P & M Fireplaces provided that the Customer shall accept P & M Fireplaces' quotation in writing within thirty (30) days.
- 5.2 P & M Fireplaces reserves the right to change the Price:
- (a) if a variation to the Materials which are to be supplied is requested; or
- (b) if a variation to the Works originally scheduled (including any changes to applicable plans) is requested; or
- (c) where additional Works are required due to the discovery of hidden or unidentifiable difficulties (including, but not limited to, poor weather, limitations to accessing the Worksite and/or crawl spaces, obscured building/Worksite defects, incorrect measurements, plans and/or specifications provided by the Customer, freight delays, structure onto which the Materials are to be affixed are unstable or in an unsuitable position, rotten timber, safety considerations (discovery of asbestos, etc.), prerequisite work by any third party not being completed, the length and position of the flue or hidden pipes and wiring in walls etc.) which are only discovered on commencement of the Works; or
- (d) in the event of increases to P & M Fireplaces in the cost of labour or materials (including but not limited to overseas transactions that may increase as a consequence of variations in foreign currency rates of exchange and/or international freight and insurance charges) which are beyond P & M Fireplaces' control.
- 5.3 Variations will be charged for on the basis of P & M Fireplaces' quotation, and will be detailed in writing, and shown as variations on P & M Fireplaces' invoice. The Customer shall be required to respond to any variation submitted by P & M Fireplaces within ten (10) working days. Failure to do so will entitle P & M Fireplaces to add the cost of the variation to the Price. Payment for all variations must be made in full at the time of their completion.
- 5.4 At P & M Fireplaces' sole discretion a deposit may be required.
- 5.5 Time for payment for the Works being of the essence, the Price will be payable by the Customer on the date determined by P & M Fireplaces, which may be:
- (a) on or before delivery of the Materials
- (b) on completion of the Works;
- (c) by way of progress payments in accordance with P & M Fireplaces' specified progress payment schedule. Such progress payment claims may include the reasonable value of authorised variations and the value of any Materials delivered to the Worksite but not yet installed.
- (d) for certain approved Customers, due twenty (20) days following the end of the month in which a statement is posted to the Customer's address or address for notices;
- (e) the date specified on any invoice or other form as being the date for payment; or
- (f) failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the Customer by P & M Fireplaces.
- 5.6 At the agreement of both parties, payment of the Price may be subject to retention by the Customer of an amount (hereafter called the "Retention Money"), being a set amount or equal to a percentage of the Price. The Customer shall hold the Retention Money for the agreed period following completion of the Works during which time all Works are to be completed and/or all defects are to be remedied. Any Retention Money applicable to this Contract is to be dealt with in accordance with Subpart 2A - sections 18(a) to 18(i) of the Construction Contracts Amendment Act 2015 and as such no Retention Money shall be used other than to remedy defects in the performance of the Contractor's obligations under the Contract.
- 5.7 Payment may be made by electronic/on-line banking, credit card (a surcharge may apply) or by any other method as agreed between the Customer and P & M Fireplaces.
- 5.8 P & M Fireplaces may in its discretion allocate any payment received from the Customer towards any invoice that P & M Fireplaces determines and may do so at the time of receipt or at any time afterwards. On any default by the Customer P & M Fireplaces may re-allocate any payments previously received and allocated in the absence of other payment allocation by P & M Fireplaces. Payment will be deemed to be allocated in such manner as preserves the maximum value of P & M Fireplaces' Purchase Money Security Interest (as defined in the PPSA) in the Materials.
- 5.9 The Customer shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Customer by P & M Fireplaces nor to withhold payment of any invoice because part of that invoice is in dispute, unless the request for payment by P & M Fireplaces is a claim made under the Construction Contracts Act 2002. Nothing in this clause 5.9 prevents the Customer from the ability to dispute any invoice.
- 5.10 Unless otherwise stated the Price does not include GST. In addition to the Price, the Customer must pay to P & M Fireplaces an amount equal to any GST P & M Fireplaces must pay for any supply by P & M Fireplaces under this or any other agreement or the sale of the Materials. The Customer must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Customer pays the Price. In addition, the Customer must pay any other taxes and duties that may be applicable in addition to the Price except where they are expressly included in the Price.
6. **Provision of the Works**
- 6.1 Subject to clause 6.2 it is P & M Fireplaces' responsibility to ensure that the Works start as soon as it is reasonably possible.
- 6.2 The Works' commencement date will be put back and the completion date extended by whatever time is reasonable in the event that P & M Fireplaces claims an extension of time (by giving the Customer written notice) where completion is delayed by an event beyond P & M Fireplaces' control, including but not limited to any failure by the Customer to:
- (a) make a selection; or
- (b) have the Worksite ready for the Works; or
- (c) notify P & M Fireplaces that the Worksite is ready.
- 6.3 At P & M Fireplaces' sole discretion, the cost of delivery is in addition to the Price.
- 6.4 P & M Fireplaces may deliver the Works by separate instalments. Each separate instalment shall be invoiced and paid in accordance with the provisions in these terms and conditions.
- 6.5 Any time specified by P & M Fireplaces for delivery of the Works is an estimate only and P & M Fireplaces will not be liable for any loss or damage incurred by the Customer as a result of delivery being late. However, both parties agree that they shall make every endeavour to enable the Works to be supplied at the time and place as was arranged between both parties. In the event that P & M Fireplaces is unable to supply the Works as agreed solely due to any action or inaction of the Customer, then P & M Fireplaces shall be entitled to charge a reasonable fee for re-supplying the Works at a later time and date, and/or for storage of the Materials.
7. **Risk**
- 7.1 If P & M Fireplaces retains ownership of the Materials under clause 11 then:
- (a) where P & M Fireplaces is supplying Materials only, all risk for the Materials shall immediately pass to the Customer on delivery and the Customer must insure the Materials on or before delivery. Delivery of the Materials shall be deemed to have taken place immediately at the time that either:
- (i) the Customer or the Customer's nominated carrier takes possession of the Materials at P & M Fireplaces' address; or
- (ii) the Materials are delivered by P & M Fireplaces or P & M Fireplaces' nominated carrier to the Customer's nominated delivery address (even if the Customer is not present at the address);
- (b) where P & M Fireplaces is to both supply and install Materials then P & M Fireplaces shall maintain a contract works insurance policy until the Works are completed. Upon completion of the Works all risk for the Works shall immediately pass to the Customer.
- 7.2 Notwithstanding the provisions of clause 7.1, if the Customer specifically requests that P & M Fireplaces is to leave Materials outside P & M Fireplaces' premises for collection or to deliver the Materials to an unattended location then such materials shall always be left at sole risk of the Customer and it shall be the Customer's responsibility to ensure the Materials are insured adequately or at all. In the event that such Materials are lost, damaged or destroyed then replacement of the Materials shall be at the Customer's expense.
- 7.3 P & M Fireplaces shall be entitled to rely on the accuracy of any plans, specifications and other information provided by the Customer. The Customer acknowledges and agrees that in the event that any of this information provided by the Customer is inaccurate, P & M Fireplaces accepts no responsibility for any loss, damages, or costs however resulting from these inaccurate plans, specifications or other information.
- 7.4 The Customer warrants that any structures to which the Materials are to be affixed are able to withstand the installation of the Materials and that any connections (including, but not limited to, cylinders, pipes, couplings and valves) are of suitable capacity to handle the Materials once installed. If for any reason (including the discovery of asbestos, rotten timber or dangerous access to or on a space) that P & M Fireplaces or employees of P & M Fireplaces reasonably believe the opinion that the Customer's premises is not safe for the installation of Materials to proceed then P & M Fireplaces shall be entitled to delay installation of the Materials until P & M Fireplaces is satisfied that it is safe for the installation to proceed.
- 7.5 The Customer acknowledges and accepts that:
- (a) where the Customer wants to use an existing outer flue and/or flashing and/or subsequently requests that the installation of the Materials, then all repair or replacement costs shall be the Customer's responsibility;
- (b) where P & M Fireplaces has performed temporary repairs that:
- (i) P & M Fireplaces offers no guarantee against the recurrence of the initial fault, or any further damage caused;
- (ii) P & M Fireplaces will immediately advise the Customer of the fault and shall provide the Customer with an estimate for the full repair required;
- (c) P & M Fireplaces is only responsible for parts that are replaced by P & M Fireplaces and does not at any stage accept any liability in respect of previous services and/or goods supplied by any other third party that subsequently fail and found to be the source of the failure, the Customer agrees to indemnify P & M Fireplaces against any loss or damage to the Materials, or caused by the Materials, or any part thereof howsoever arising; and
- 7.6 Materials supplied may:
- (a) fade or change colour over time;
- (b) expand, contract or distort as a result of exposure to heat, cold, weather, rain or stain exposed to certain substances; and
- (c) be damaged or disfigured by impact or scratching.
- 7.7 Where P & M Fireplaces requires that Materials, tools etc. required for the Works be stored at the Worksite, the Customer shall supply P & M Fireplaces a safe area for storage and shall take all reasonable efforts to protect all items from destruction, theft or damage. In the event that any of the stored items are destroyed, stolen or damaged, then the cost of repair or replacement shall be the Customer's responsibility.
8. **Worksite Access and Condition**
- 8.1 P & M Fireplaces is not responsible for the removal of rubbish from or cleaning of the building/construction Worksite(s). All rubbish generated by P & M Fireplaces will be placed in a skip at the Worksite as approved by the Customer. The responsibility of removal of same is the Customer or the Customer's agent, unless otherwise agreed.
- 8.2 It is the intention of P & M Fireplaces and agreed by the Customer that:
- (a) the Customer shall ensure that P & M Fireplaces has clear and free access to the Worksite at all times to enable them to undertake the Works and that the Worksite is clear of any obstructions, gain signposts for required documents, and for the delivery and installation of the Materials; P & M Fireplaces shall not be liable for any loss or damage to the Worksite (including, without limitation, damage to pathways, driveways and concrete or paved or grassed areas) unless due to the negligence of P & M Fireplaces; and
- (b) it is the Customer's responsibility to provide P & M Fireplaces, while at the Worksite, with adequate access to available water, electricity, toilet and washing facilities where required.
- 8.3 The Customer agrees to be present at the Worksite when and as reasonably requested by P & M Fireplaces and its employees, contractors and/or agents.
- 8.4 **Worksite Inductions**
- (a) in the event the Customer requires an employee or sub-contractor of P & M Fireplaces to undertake a Worksite induction during working hours, the Customer will be liable to pay the hourly charges for that period. If any induction needs to be undertaken prior to the commencement date then the Customer shall be liable to pay P & M Fireplaces' standard (and/or overtime, if applicable) hourly labour rate; or
- (b) where P & M Fireplaces is in control of the Worksite, the Customer and/or the Customer's third-party contractors must initially carry out P & M Fireplaces' Health & Safety induction course before access to the Worksite will be granted. Inspection of the Worksite during the course of the Works will be by **appointment only** and unless otherwise agreed, in such an event the Customer and/or third party acting on behalf of the Customer must at all times be accompanied by P & M Fireplaces.
9. **Underground Locations**
- 9.1 Prior to P & M Fireplaces commencing any work the Customer must advise P & M Fireplaces of the precise location of all underground services on the Worksite and clearly mark the same. The underground mains and services the Customer must identify include, but are not limited to, electrical services, gas services, sewer services, pumping services, sewer connections, sewer sludge mains, water mains, irrigation pipes, telephone cables, fibre optic cables, oil pumping mains, and any other services that may be on the Worksite.
- 9.2 Whilst P & M Fireplaces will take all care to avoid damage to any underground services the Customer agrees to indemnify P & M Fireplaces in respect of all and any liability claims, losses, damages, costs and fines as a result of damage to services not precisely located and notified as per clause 9.1.
10. **Compliance with Laws**
- 10.1 The Customer and P & M Fireplaces shall comply with the provisions of all statutes, regulations and bylaws of government, local and other public authorities that may be applicable to the Works, including any WorkSafe health and safety laws relating or any other relevant safety standards or legislation pertaining to the Works.
- 10.2 Both parties acknowledge and agree:
- (a) to comply with the Building Act 2004 (including any subsequent Amendments) in respect of all workmanship and building products to be supplied during the course of the Works; and
- (b) that Works will be provided in accordance with any current relevant Australian/New Zealand Standards applicable.
- 10.3 Where the Customer has supplied products for P & M Fireplaces to complete the Works, the Customer acknowledges that it accepts responsibility for the suitability of purpose and use for their products and the Intended Use and any faults or failures that may be applicable to the Works, including any WorkSafe health and safety laws in the workplace regardless of whether they may be the party in control of the Worksite or where they may be acting as a sub-contractor to the Customer who has engaged a third party head contractor.
- 10.4 The Customer shall obtain (at the expense of the Customer) all licenses Council consents and approvals that may be required for the Works.
- 10.5 Notwithstanding clause 10.1 and pursuant to the Health & Safety at Work Act 2015 (the "HSW Act"), P & M Fireplaces agrees at all times to comply with sections 28 and 34 of the HSW Act with meeting their obligations for health and safety laws in the workplace regardless of whether they may be the party in control of the Worksite or where they may be acting as a sub-contractor to the Customer who has engaged a third party head contractor.
11. **Title**
- 11.1 P & M Fireplaces and the Customer agree that ownership of the Materials shall not pass until:
- (a) the Customer has paid P & M Fireplaces all amounts owing to P & M Fireplaces; and
- (b) the Customer has met all of its other obligations to P & M Fireplaces.
- 11.2 Receipt by P & M Fireplaces 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.
- 11.3 It is further agreed that:
- (a) where the Customer passes the Materials to the Customer in accordance with clause 11.1 that the Customer is only a bailee of the Materials and unless the Materials have become fixtures must return the Materials to P & M Fireplaces on request;
- (b) the Customer holds the benefit of the Customer's insurance of the Materials on trust for P & M Fireplaces and must pay to P & M Fireplaces the proceeds of any insurance in the event of the Materials being lost, damaged or destroyed;
- (c) the production of these terms and conditions by P & M Fireplaces shall be sufficient evidence of P & M Fireplaces' rights to receive the insurance proceeds direct from the insurer without the need for any person dealing with P & M Fireplaces to make further enquiries;
- (d) the Customer must not sell, dispose, or otherwise part with possession of the Materials or other goods but if the Customer does so then the Customer holds the resulting product on trust for the benefit of P & M Fireplaces and must sell dispose of or return the resulting product to P & M Fireplaces as it so directs;
- (e) unless the Materials have become fixtures the Customer irrevocably authorises P & M Fireplaces to enter any premises where P & M Fireplaces believes the Materials are kept and recover possession of the Materials;
- (f) P & M Fireplaces may recover possession of any Materials in transit whether or not delivery has occurred;
- (g) the Customer shall not charge or grant an encumbrance over the Materials nor grant nor otherwise give away any interest in the Materials while they remain the property of P & M Fireplaces; and
- (h) P & M Fireplaces may commence proceedings to recover the Price of the Materials sold notwithstanding that ownership of the Materials has not passed to the Customer.
12. **Personal Property Securities Act 1999 ("PPSA")**
- 12.1 Upon assenting to these terms and conditions in writing the Customer acknowledges and agrees that:
- (a) these terms and conditions constitute a security agreement for the purposes of the PPSA; and
- (b) a security interest is taken in all Materials that have previously been supplied and that will be supplied in the future by P & M Fireplaces to the Customer and that will be supplied in the future by P & M Fireplaces to the Customer and that will be supplied in the future by P & M Fireplaces to the Customer and that will be supplied in the future by P & M Fireplaces to the Customer.
- 12.2 The Customer undertakes to:
- (a) sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which P & M Fireplaces may reasonably require to register a financing statement or financing charge statement on the Personal Property Securities Register;
- (b) indemnify, and upon demand reimburse, P & M Fireplaces for all expenses incurred in registering a financing statement or financing charge statement on the Personal Property Securities Register or releasing any Materials charged thereby;
- (c) not register, or permit to be registered, a financing statement or a financing charge statement in relation to the Materials or the proceeds of such Materials in favour of a third party without the prior written consent of P & M Fireplaces; and
- (d) immediately advise P & M Fireplaces of any material change in its business practices of selling Materials which would result in a change in the nature of proceeds derived from such sales.
- 12.3 P & M Fireplaces and the Customer agree that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to these terms and conditions.
- 12.4 The Customer waives its rights as a debtor under sections 116, 120(2), 121, 125, 126, 127, 129, and 131 of the PPSA.
- 12.5 Unless otherwise agreed to in writing by P & M Fireplaces, the Customer waives its right to receive a verification statement in accordance with section 148 of the PPSA.

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- (a) sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which P & M Fireplaces may reasonably require to register a financing statement or financing charge statement on the Personal Property Securities Register;
- (b) indemnify, and upon demand reimburse, P & M Fireplaces for all expenses incurred in registering a financing statement or financing charge statement on the Personal Property Securities Register or releasing any Materials charged thereby;
- (c) not register, or permit to be registered, a financing statement or a financing charge statement in relation to the Materials or the proceeds of such Materials in favour of a third party without the prior written consent of P & M Fireplaces; and
- (d) immediately advise P & M Fireplaces of any material change in its business practices of selling Materials which would result in a change in the nature of proceeds derived from such sales.
- 1.2 P & M Fireplaces and the Customer agree that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to these terms and conditions.
- 1.3 The Customer waives its rights as a debtor under sections 116, 120(2), 121, 125, 126, 127, 129, and 131 of the PPSA.
- 1.4 Unless otherwise agreed to in writing by P & M Fireplaces, the Customer waives its right to receive a verification statement in accordance with section 148 of the PPSA.
- 1.5 The Customer shall unconditionally ratify any actions taken by P & M Fireplaces under clauses **Error! Reference source not found.** to 1.4.
- 1.6 Subject to any express provisions to the contrary (including those contained in this clause **Error! Reference source not found.**), nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.
- 2. Security and Charge**
- 2.1 In consideration of P & M Fireplaces agreeing to supply the Works, the Customer charges all of its rights, title and interest (whether joint or several) in any land, realty or other assets capable of being charged, owned by the Customer either now or in the future, and the Customer grants a security interest in all of its present and after-acquired property, to secure the performance by the Customer of its obligations under these terms and conditions (including, but not limited to, the payment of any money). The terms of the charge and security interest are the terms of Memorandum 2018/4344 registered pursuant to s.209 of the Land Transfer Act 2017.
- 2.2 The Customer indemnifies P & M Fireplaces from and against all P & M Fireplaces' costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising P & M Fireplaces' rights under this clause.
- 2.3 The Customer irrevocably appoints P & M Fireplaces and each director of P & M Fireplaces as the Customer's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 2 including, but not limited to, signing any document on the Customer's behalf.
- 3. Defects and Returns**
- 3.1 The Customer shall inspect the Materials on delivery and shall within seven (7) days of delivery (time being of the essence) notify P & M Fireplaces of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Customer shall afford P & M Fireplaces an opportunity to inspect the Materials within a reasonable time following delivery if the Customer believes the Materials are defective in any way. If the Customer shall fail to comply with these provisions the Materials shall be presumed to be free from any defect or damage. For defective Materials, which P & M Fireplaces has agreed in writing that the Customer is entitled to reject, P & M Fireplaces' liability is limited to either (at P & M Fireplaces' discretion) replacing the Materials or repairing the Materials.
- 3.2 Returns will only be accepted provided that:
- (a) the Customer has complied with the provisions of clause 3.1; and
- (b) P & M Fireplaces has agreed in writing to accept the return of the Materials; and
- (c) the Materials are returned at the Customer's cost within fourteen (14) days of the delivery date; and
- (d) P & M Fireplaces will not be liable for Materials which have not been stored or used in a proper manner; and
- (e) the Materials 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.
- 3.3 Subject to clause 3.1, non-stocklist items or Materials made to the Customer's specifications are under no circumstances acceptable for credit or return.
- 4. Warranties**
- 4.1 Subject to the conditions of warranty set out in clause 4.2 P & M Fireplaces warrants that if any defect in any Materials manufactured or Works provided by P & M Fireplaces becomes apparent and is reported to P & M Fireplaces at within three (3) months of the date of delivery (time being of the essence) then P & M Fireplaces will either (at P & M Fireplaces' sole discretion) replace or remedy the defect.
- 4.2 The conditions applicable to the warranty given by clause 4.1 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 Customer to properly maintain any Materials or serviced item;
- (ii) failure on the part of the Customer to follow any instructions or guidelines provided by P & M Fireplaces; or
- (iii) any use of any Materials or serviced item otherwise than for any application specified on a quote or order form; or
- (iv) the continued use of any Materials or serviced item 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 P & M Fireplaces shall thereafter in no circumstances be liable under the terms of the warranty if the workmanship is repaired, altered or overhauled without P & M Fireplaces' consent.
- (c) in respect of all claims P & M Fireplaces shall not be liable to compensate the Customer for any delay in either replacing or remedying the workmanship or in properly assessing the Customer's claim.
- 4.3 For Materials not manufactured by P & M Fireplaces, the warranty shall be the current warranty provided by the manufacturer of the Materials. P & M Fireplaces shall not be bound by nor be responsible for any term, condition, representation or warranty other than that which is given by the manufacturer of the Materials.
- 4.4 The conditions applicable to the warranty given on Materials supplied by P & M Fireplaces are contained on the "Warranty Documentation" that will be supplied with the Materials.
- 5. Consumer Guarantees Act 1993**
- 5.1 If the Customer is acquiring Materials for the purposes of a trade or business, the Customer acknowledges that the provisions of the Consumer Guarantees Act 1993 ("CGA") do not apply to the supply of Materials by P & M Fireplaces to the Customer.
- 6. Intellectual Property**
- 6.1 Where P & M Fireplaces has designed, drawn, written plans or a schedule of Works, or created any products for the Customer, then the copyright in all such designs, drawings, documents, plans, schedules and products shall remain vested in P & M Fireplaces, and shall only be used by the Customer at P & M Fireplaces' discretion. Under no circumstances may such designs, drawings and documents be used without the express written approval of P & M Fireplaces.
- 6.2 The Customer warrants that all designs, specifications or instructions given to P & M Fireplaces will not cause P & M Fireplaces to infringe any patent, registered design or trademark in the execution of the Customer's order and the Customer agrees to indemnify P & M Fireplaces against any action taken by a third party against P & M Fireplaces in respect of any such infringement.
- 6.3 The Customer agrees that P & M Fireplaces may (at no cost) use for the purposes of marketing or entry into any competition, any documents, designs, drawings, plans or products which P & M Fireplaces has created for the Customer.
- 7. Default and Consequences of Default**
- 7.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and a half percent (2.5%) per calendar month (and at P & M Fireplaces' sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 7.2 If the Customer owes P & M Fireplaces any money the Customer shall indemnify P & M Fireplaces from and against all costs and disbursements incurred by P & M Fireplaces in recovering the debt (including but not limited to interest fees, legal costs on a solicitor and own client basis, P & M Fireplaces' collection agency costs, and bank dis Honour fees).
- 7.3 Further to any other rights or remedies P & M Fireplaces may have under this Contract, if a Customer has made payment to P & M Fireplaces, and the transaction is subsequently reversed, the Customer shall be liable for the amount of the reversed transaction, in addition to any further costs incurred by P & M Fireplaces under this clause 7, where it can be proven that such reversal is found to be illegal, fraudulent or in contravention to the Customer's obligations under this Contract.
- 7.4 Without prejudice to P & M Fireplaces' other remedies at law P & M Fireplaces shall be entitled to cancel all or any part of any order of the Customer which remains unfulfilled and all amounts owing to P & M Fireplaces shall, whether or not due for payment, become immediately payable if:
- (a) any money payable to P & M Fireplaces becomes overdue, or in P & M Fireplaces' opinion the Customer will be unable to make a payment when it falls due;
- (b) the Customer has exceeded any applicable credit limit provided by P & M Fireplaces;
- (c) the Customer becomes insolvent or bankrupt, 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
- (d) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Customer or any asset of the Customer.
- 8. Cancellation**
- 8.1 Without prejudice to any other rights or remedies P & M Fireplaces may have, if at any time the Customer is in breach of any obligation (including those relating to payment and/or failure to remedy any breach) in respect of this Contract within ten (10) working days of receipt by the Customer of such notice(s) then P & M Fireplaces may suspend or terminate the supply of the Works. P & M Fireplaces will not be liable to the Customer for any loss or damage the Customer suffers because P & M Fireplaces has exercised its rights under this clause.
- 8.2 P & M Fireplaces may cancel any contract to which these terms and conditions apply or cancel delivery of Works at any time before the Works are commenced by giving written notice to the Customer. On giving such notice P & M Fireplaces shall repay to the Customer any sums paid in respect of the Price, less any amounts owing by the Customer to P & M Fireplaces for Works already performed. P & M Fireplaces shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 8.3 In the event that the Customer cancels the delivery of Works the Customer shall be liable for any and all loss incurred (whether direct or indirect) by P & M Fireplaces as a direct result of the cancellation (including, but not limited to, any loss of profits).
- 8.4 Cancellation of orders for products made to the Customer's specifications, or for non-stocklist items, will definitely not be accepted once production has commenced, or an order has been placed.
- 9. Privacy Policy**
- 9.1 All emails, documents, images or other recorded information held or used by P & M Fireplaces is "Personal Information" as defined and referred to in clause 9.3 and therefore considered confidential. P & M Fireplaces acknowledges its obligation in relation to the handling, use, disclosure and protection of Personal Information pursuant to the Privacy Act 2020 ("the Act") including Part II of the OECD Guidelines and as set out in the Act. P & M Fireplaces acknowledges that in the event it becomes aware of any data breaches and/or disclosure of the Customer's Personal Information, held by P & M Fireplaces that may result in serious harm to the Customer, P & M Fireplaces will notify the Customer in accordance with the Act. Any release of such Personal Information must be in accordance with the Act and must be approved by the Customer by written consent, unless subject to an operation of law.
- 9.2 Notwithstanding clause 9.1, privacy limitations will extend to P & M Fireplaces in respect of Cookies where the Customer utilises P & M Fireplaces' website to make enquiries. P & M Fireplaces agrees to display reference to such Cookies and/or similar tracking technologies, such as pixels and web beacons (if applicable), such technology allows the collection of Personal Information such as the Customer's:
- (a) IP address, browser, email client type and other similar details;
- (b) tracking website usage and traffic; and
- (c) records are available to P & M Fireplaces when P & M Fireplaces sends information to the Customer, so that the Customer may collect and review that information ("collectively Personal Information").
- If the Customer consents to P & M Fireplaces' use of Cookies on P & M Fireplaces' website and later wishes to withdraw that consent, the Customer may manage and control P & M Fireplaces' privacy controls via the Customer's web browser, including removing Cookies by deleting them from the browser's history when exiting the site.
- 9.3 The Customer authorises P & M Fireplaces or P & M Fireplaces' agent to:
- (a) access, collect, retain and use any information about the Customer:
- (i) including name, address, D.O.B, occupation, driver's license details, electronic contact (email, Facebook or Twitter details), medical insurance details or next of kin and other contact information (where applicable), previous credit applications, credit history or any overdue fines balance information held by the Ministry of Justice) for the purpose of assessing the Customer's creditworthiness; or
- (ii) for the purpose of marketing products and services to the Customer;
- (b) disclose information about the Customer, whether collected by P & M Fireplaces from the Customer directly or obtained by P & M Fireplaces 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 Customer.
- 9.4 Where the Customer is an individual the authorities under clause 9.3 are authorities or consents for the purposes of the Privacy Act 2020.
- 9.5 The Customer shall have the right to request (by e-mail) from P & M Fireplaces, a copy of the Personal Information about the Customer retained by P & M Fireplaces and the right to request that P & M Fireplaces correct any incorrect Personal Information.
- 9.6 P & M Fireplaces will destroy Personal Information upon the Customer's request (by e-mail) or if it is no longer required unless it is required in order to fulfil the obligations of this Contract or is required to be maintained and/or stored in accordance with the law.
- 9.7 The Customer can make a privacy complaint by contacting P & M Fireplaces via e-mail. P & M Fireplaces will respond to that complaint within seven (7) days of receipt and will take all reasonable steps to make a decision as to the complaint within twenty (20) days of receipt of the complaint. In the event that the Customer is not satisfied with the resolution provided, the Customer can make a complaint to the Privacy Commissioner at <http://www.privacy.org.nz>.
- 10. Suspension of Works**
- 10.1 Where the Contract is subject to section 24A of the Construction Contracts Act 2002, the Customer hereby expressly acknowledges that:
- (a) P & M Fireplaces has the right to suspend work within five (5) working days of written notice of its intent to do so if a payment claim is served on the Customer and:
- (i) the payment is not paid in full by the due date for payment in accordance with clause **Error! Reference source not found.** and/or any subsequent amendments or new legislation and no payment schedule has been given by the Customer; or
- (ii) a scheduled amount stated in a payment schedule issued by the Customer in relation to the payment claim is not paid in full by the due date for its payment; or
- (iii) the Customer has not complied with an adjudicator's notice that the Customer must pay an amount to P & M Fireplaces by a particular date; and
- (iv) P & M Fireplaces has given written notice to the Customer of its intention to suspend the carrying out of construction work under the construction Contract.
- (b) if P & M Fireplaces suspends work, it:
- (i) is not in breach of Contract; and
- (ii) is not liable for any loss or damage whatsoever suffered, or alleged to be suffered, by the Customer or by any person claiming through the Customer; and
- (iii) is entitled to an extension of time to complete the Contract; and
- (iv) keeps its rights under the Contract including the right to terminate the Contract; and may at any time lift the suspension, even if the amount has not been paid or an adjudicator's determination has not been completed with.
- (c) if P & M Fireplaces exercises the right to suspend work, the exercise of that right does not:
- (i) affect any rights that would otherwise have been available to P & M Fireplaces under the Contract and Commercial Law Act 2017; or
- (ii) enable the Customer to exercise any rights that may otherwise have been available to the Customer under that Act as a direct consequence of P & M Fireplaces suspending work under this provision;
- (d) due to any act or omission by the Customer, the Customer effectively precludes P & M Fireplaces from continuing the Works or performing or complying with P & M Fireplaces' obligations under this Contract, then without prejudice to P & M Fireplaces' other rights and remedies, P & M Fireplaces may suspend the Works immediately after serving on the Customer a written notice specifying the payment default or the act or omission or default upon which the suspension of the Works is based. All costs and expenses incurred by P & M Fireplaces as a result of such suspension and recommencement shall be payable by the Customer as if they were a variation.
- 10.2 If pursuant to any right conferred by this Contract, P & M Fireplaces suspends the Works and the default that led to that suspension continues unremedied subject to clause 8.1 for at least ten (10) working days, P & M Fireplaces shall be entitled to terminate the Contract, in accordance with clause 8.
- 11. Service of Notices**
- 11.1 Any written notice given under this Contract shall be deemed to have been given and received:
- (a) by handing the notice to the other party, in person;
- (b) by leaving it at the address of the other party as stated in this Contract;
- (c) by sending it by registered post to the address of the other party as stated in this Contract;
- (d) if sent by facsimile transmission to the fax number of the other party as stated in this Contract (if any), on receipt of confirmation of the transmission;
- (e) if sent by email to the other party's last known email address.
- 11.2 Any notice that is posted shall be deemed to have been served, unless the contrary is shown, at the time when by the ordinary course of post, the notice would have been delivered.
- 12. Trusts**
- 12.1 If the Customer at any time upon or subsequent to entering into the Contract is acting in the capacity of trustee of any trust ("Trust") then whether or not P & M Fireplaces may have notice of the Trust, the Customer covenants with P & M Fireplaces as follows:
- (a) the Contract extends to all rights of indemnity which the Customer now or subsequently may have against the Trust and the trust fund;
- (b) the Customer has full and complete power and authority under the Trust to enter into the Contract and the provisions of the Trust do not purport to exclude or take away the right of indemnity of the Customer against the Trust or the trust fund. The Customer will not release the right of indemnity or commit any breach of trust or be a party to any other action which might prejudice that right of indemnity;
- (c) the Customer will not without consent in writing of P & M Fireplaces (P & M Fireplaces will not unreasonably withhold consent), cause, permit, or suffer to happen any of the following events:
- (i) the removal, replacement or retirement of the Customer as trustee of the Trust;
- (ii) any alteration to or variation of the terms of the Trust;
- (iii) any advancement or distribution of capital of the Trust; or
- (iv) any resettlement of the trust property.
- 13. General**
- 13.1 Any dispute or difference arising as to the interpretation of these terms and conditions or as to any matter arising hereunder, shall be submitted to, and settled by, either adjudication in accordance with section 26 of the Construction Contracts Act 2002 and/or by arbitration in accordance with the Arbitration Act 1996 or its replacement(s).
- 13.2 The failure by either party to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect that party's right to subsequently enforce that provision. If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 13.3 These terms and conditions and any contract to which they apply shall be governed by the laws of New Zealand and are subject to the jurisdiction of the Nelson Courts of New Zealand.
- 13.4 Subject to the CGA, P & M Fireplaces shall be under no liability whatsoever to the Customer for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Customer arising out of a breach by P & M Fireplaces of these terms and conditions (alternatively P & M Fireplaces liability shall be limited to damages which under no circumstances shall exceed the Price of the Works).
- 13.5 P & M Fireplaces may licence and/or assign all or any part of its rights and/or obligations under this Contract without the Customer's consent.
- 13.6 The Customer cannot licence or assign without the written approval of P & M Fireplaces.
- 13.7 P & M Fireplaces may elect to subcontract out any part of the Works but shall not be relieved from any liability or obligation under this Contract by so doing. Furthermore, the Customer agrees and understands that they have no authority to give any instruction to any of P & M Fireplaces' subcontractors without the authority of P & M Fireplaces.
- 13.8 The Customer agrees that P & M Fireplaces may amend their general terms and conditions for subsequent future contracts with the Customer by disclosing such to the Customer in writing. These changes shall be deemed to take effect from the date on which the Customer accepts such changes, or otherwise at such time as the Customer makes a further request for P & M Fireplaces to provide Works to the Customer.
- 13.9 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm, national or global pandemics and/or the implementation of regulation, directions, rules or measures being enforced by Governments of embargo, including but not limited to, any Government imposed border lockdowns (including, worldwide destination ports), etc. ("Force Majeure") or other event beyond the reasonable control of either party. This clause does not apply to a failure by the Customer to make a payment to P & M Fireplaces.
- 13.10 Both parties warrant that they have the power to enter into this Contract and have obtained all necessary authorisations to allow them to do so, they are not insolvent and that this Contract creates binding and valid legal obligations on them.