

## Schedule 8: TERMS AND CONDITIONS

### 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 **"DK"** means Degabriele Kitchens NSW Pty Ltd T/A Degabriele Kitchens, its successors and assigns or any person acting on behalf of and with the authority of Degabriele Kitchens NSW Pty Ltd T/A Degabriele Kitchens.
- 1.3 **"Client"** means the person/s, entities, corporations or any person acting on behalf of and with the authority of the Client requesting DK to provide the Works as specified in any proposal, quotation, order, invoice or other documentation, and:  
(a) if there is more than one Client, is a reference to each Client jointly and severally; and  
(b) if the Client is a partnership, it shall bind each partner jointly and severally; and  
(c) if the Client is a part of a Trust, shall be bound in their capacity as a trustee; and  
(d) includes the Client's executors, administrators, successors and permitted assigns.
- 1.4 **"Works"** means all Works (including consultation, manufacturing and/or installation services) or Materials supplied by DK to the Client at the Client'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 Client to which the Materials are to be supplied by DK.
- 1.6 **"Intended Use"** means a building or joinery product and the use thereof, for which the building or joinery product is intended to be, or is reasonably likely to be, associated with a building or renovation.
- 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 does not perform, 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 **"Confidential Information"** means information of a confidential nature whether oral, written or in electronic form including, but not limited to, this Contract, either party's intellectual property, operational information, know-how, trade secrets, financial and commercial affairs, contracts, client information (including but not limited to, **"Personal Information"** such as: 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) and pricing details.
- 1.9 **"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 Client does not wish to allow Cookies to operate in the background when using DK's website, then the Client 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.**
- 1.10 **"Price"** means the Price payable (plus any GST where applicable) for the Works as agreed between DK and the Client in accordance with clause 7 below.
- 1.11 **"GST"** means Goods and Services Tax as defined within the "A New Tax System (Goods and Services Tax) Act 1999" (Cth).

### 2. Acceptance/Cooling off Period

- 2.1 The Client is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Client places an order for or accepts delivery of any Works.
- 2.2 The Work to be done is specified as that included in the Specifications and attached plans of this Contract.
- 2.3 The Client is able to withdraw from this Contract during the cooling off period being five (5) clear Business days after the Contract is entered into and the Client is in receipt of the signed Contract. Weekend days, NSW public holidays and the days 27<sup>th</sup>-31<sup>st</sup> December inclusive do not count.
- 2.4 To withdraw from this Contract, the Client must complete a written withdrawal notice pursuant to section 7BA of the Home Building Act 1989 within the specified timeframe and  
(a) Give it to a duly authorised representative of DK in person, or  
(b) Leave it at the addresses of DK as written on this Contract, or  
(c) Serve it on DK in accordance with any provision in the Contract providing for service of notices on DK by the Client
- 2.5 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.
- 2.6 Any amendment to the terms and conditions contained in this Contract may only be amended in writing by the consent of both parties.
- 2.7 The Client acknowledges that the supply of Works on credit shall not take effect until the Client has completed a credit application with DK and it has been approved with a credit limit established for the account.
- 2.8 In the event that the supply of Works request exceeds the Client's credit limit and/or the account exceeds the payment terms, DK reserves the right to refuse delivery.
- 2.9 Electronic signatures shall be deemed to be accepted by either party providing that the parties have complied with Section 9 of the Electronic Transactions Act 2000 or any other applicable provisions of that Act or any Regulations referred to in that Act.

### **3. Authorised Representatives**

- 3.1 Unless otherwise limited as per clause 3.2, the Client agrees that should the Client introduce any third party to DK as the Client's duly authorised representative, that once introduced that person shall have the full authority to act on behalf of the Client under this Contract; such authority shall continue until the time that the Client notifies DK otherwise that the said person is no longer the Client's duly authorised representative.
- 3.2 In the event that the Client's duly authorised representative, as per clause 3.1, is to have only limited authority to act on the Client's behalf, then the Client must specifically and clearly advise DK in writing of the parameters of the limited authority granted to that authorised representative.
- 3.3 The Client specifically acknowledges and accepts that they will be solely liable to DK for all additional costs incurred by DK (including DK's profit margin) in providing Works and/or Materials requested by the Client's duly authorised representative (subject always to the limitations imposed under clause 3.2 (if any)).

### **4. Out of Stock/Substitution**

- 4.1 DK will use its reasonable endeavours to ensure that all Materials ordered by the Client are supplied to the Client. If the Materials ordered are not available, DK shall work with the Client on a case by case basis where options may include back order of Materials or amendment to the order.

### **5. Errors and Omissions**

- 5.1 The Client acknowledges and accepts that DK 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 DK 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 DK in respect of the Works.
- 5.2 In the event such an error and/or omission occurs in accordance with clause 5.1, and is not attributable to the negligence and/or wilful misconduct of DK; the Client shall not be entitled to treat this Contract as repudiated nor render it invalid.

### **6. Change in Control**

- 6.1 The Client shall give DK not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client and/or any other change in the Client's details (including but not limited to, changes in the Client's name, address, contact phone or fax number/s, change of trustees, or business practice). The Client shall be liable for any loss incurred by DK as a result of the Client's failure to comply with this clause.

### **7. Price and Payment**

- 7.1 At DK's sole discretion the Price shall be either:
- (a) as indicated on invoices, specifications and plans provided by DK to the Client in respect of Works performed or Materials supplied; or
  - (b) DK's quoted Price (subject to clause 7.2) which shall be binding upon DK provided that the Client shall accept DK's quotation in writing within one hundred and eighty (180) days.
- 7.2 DK 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 applicable plans, specifications and final slab (including but not limited to natural stone, granite, marble and limestone) selection is requested; or
  - (c) if during the course of the Works, the Materials cease to be available from DK's third party suppliers, then DK reserves the right to provide alternative Materials, subject to prior confirmation and agreement of both parties; or
  - (d) 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, obscured building/Worksite defects, incorrect measurements provided by the Client, final check measurement, removal of cabinets, safety considerations (discovery of asbestos, etc.), prerequisite work by any third party not being completed, remedial work required due to existing workmanship being of a poor quality or non-compliant to the building code, iron reinforcing rods in concrete or hidden pipes and wiring in walls, etc.) which are only discovered on commencement of the Works; or
  - (e) in the event of increases to DK in the cost of labour or Materials which are beyond DK's control.
- 7.3 Variations requested by DK will be charged for on the basis of DK's quotation, and will be detailed in writing specifying
- (a) The reason for the variation,
  - (b) a full description of the variation, and
  - (c) state any effect the variation will have on the Contract Price, and
  - (d) will be shown as variations on DK's invoice.
- The Client shall be required to respond to any variation submitted by DK within ten (10) working days. Failure to do so will entitle DK 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.
- 7.4 In the event that the Client requests a Variation, then

- (a) DK will give the Client a written Variation to Contract detailing the Works, the amended Contract Price, the estimated time to undertake the variation and the likely delay to the Works (if any), and require written acceptance by the Client before commencing any Works detailed in the variation.
- (b) DK may (without having to give reasons why) refuse to undertake any variation requested by the Client
- 7.5 At DK's sole discretion a non-refundable deposit may be required.
- 7.6 Time for payment for the Works being of the essence, the Price will be payable by the Client on the date/s determined by DK, which may be:
- (a) on completion of the Works; or
- (b) on or before delivery of the Materials; or
- (c) by way of progress payments in accordance with DK's 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; or
- (d) thirty (30) days following the end of the month in which a statement is posted to the Client's address or address for notices; or
- (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 Client by DK.
- 7.7 Payment may be made by, bank cheque, electronic/on-line banking, credit card (a surcharge may apply per transaction), or by any other method as agreed to between the Client and DK.
- 7.8 DK may in its discretion allocate any payment received from the Client towards any invoice that DK determines and may do so at the time of receipt or at any time afterwards. On any default by the Client DK may re-allocate any payments previously received and allocated. In the absence of any payment allocation by DK, payment will be deemed to be allocated in such manner as preserves the maximum value of DK's Purchase Money Security Interest (as defined in the PPSA) in the Materials.
- 7.9 The Client shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Client by DK nor to withhold payment of any invoice because part of that invoice is in dispute.
- 7.10 Unless otherwise stated the Price does not include GST. In addition to the Price, the Client must pay to DK an amount equal to any GST DK must pay for any supply by DK under this or any other contract for the sale of the Materials. The Client must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Client pays the Price.
- 7.11 In addition, the Client must pay any taxes and duties that may be applicable in addition to the Price when materials are sourced from overseas suppliers except where they are expressly included in the Price. Where payment has been made in a foreign currency, the Client shall be responsible for any and all banking costs associated with currency conversion.

## **8. Provision of the Works**

- 8.1 Subject to clause 8.2 it is DK's responsibility to ensure that the Works start as soon as it is reasonably possible and DK will advise the Client approximately three (3) working days prior to delivery.
- 8.2 The Works' commencement date will be put back and/or the completion date extended by whatever time is reasonable in the event that DK claims an extension of time (by giving the Client written notice) where completion is delayed by an event beyond DK's control, including but not limited to any failure by the Client to:
- (a) make a selection; or
- (b) have the Worksite ready for the Works; or
- (c) notify DK that the Worksite is ready.
- 8.3 At the time of delivery, the delivery payment (notwithstanding the provisions of clause 7.6) is payable by the Client in the form of a bank cheque to DK. Should the delivery payment be unavailable at the agreed time of both parties, then DK reserves the right to refuse and/or cancel delivery in accordance with clause 23 and in the event of any expenses incurred by DK in redelivering the Works, will be payable by the Client, notwithstanding the provisions of clause 8.5
- 8.4 At DK's sole discretion, the cost of delivery is either included in the Price or is in addition to the Price.
- 8.5 Any time specified by DK for delivery of the Works is an estimate only and DK will not be liable for any loss or damage incurred by the Client 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 DK is unable to supply the Works as agreed solely due to any action or inaction of the Client, then DK 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.

## **9. Worksite Access and Condition**

- 9.1 DK is not responsible for the removal of rubbish from or clean-up of the building/construction Worksite/s. All rubbish generated by DK will be placed in a designated area appointed by the Client but the responsibility of removal of same is the Clients or the Client's agent, unless otherwise agreed.
- 9.2 It is the intention of DK and agreed by the Client that:
- (a) the Client shall ensure that DK has clear and free access to the Worksite at all times to enable them to undertake the Works (including carrying out Worksite inspections, gain signatures for required documents, and for the delivery and installation of the Materials). DK shall not be liable for any loss or damage to the Worksite (including, without limitation, damage to pathways, driveways and concreted or paved or grassed areas) unless due to the negligence of DK; and
- (b) it is the Client's responsibility to provide DK, while at the Worksite, with adequate access to available water, electricity, toilet and washing facilities.

## 10. Risk

- 10.1 If DK retains ownership of the Materials under clause 12 then:
- (a) where DK is supplying Materials only, all risk for the Materials shall immediately pass to the Client on delivery and the Client 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 the Materials are delivered by DK or DK's nominated carrier to the Client's nominated delivery address (even if the Client is not present at the address); or
  - (b) where DK is to both supply and install Materials then DK 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 Client.
- 10.2 Notwithstanding the provisions of clause 10.1 if the Client specifically requests DK to leave Materials outside DK's premises for collection or to deliver the Materials to an unattended location then such materials shall always be left at sole risk of the Client and it shall be the Client'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 Client's expense.
- 10.3 Where DK is required to install the Materials the Client warrants that the structure of the premises or equipment in or upon which these Materials are to be installed or erected is sound and will sustain the installation and work incidental thereto and DK shall not be liable for any claims, demands, losses, damages, costs and expenses howsoever caused or arising in connection with the installation and work incidental thereto.
- 10.4 In the event asbestos or any other toxic substances are discovered at the Worksite, that it is the Client's responsibility to ensure the safe removal of the same. The Client further agrees to indemnify DK against any costs incurred by DK as a consequence of such discovery. Under no circumstances will DK handle removal of asbestos product.
- 10.5 DK is only responsible for Materials that are replaced by DK, and in the event that other components, subsequently fail, the Client agrees to indemnify DK against any loss or damage to the Works, or caused by the components, or any part thereof howsoever arising.
- 10.6 DK shall not be liable whatsoever for:
- (a) any loss or damage to the Works that is caused by any other tradesmen during and after the completion of the Works; or
  - (b) delays caused by any other third party suppliers that impacts on the provision of the Works by DK; or
  - (c) any defect or damage resulting from incorrect or faulty installation carried out by any other third party; or
  - (d) if the Client instructs DK to rectify any damage caused by any other tradesmen, this will become a variation to the original quotation and will be charged at DK's normal hourly rate.
- 10.7 All potential waterproofing surfaces are subject to an inspection by DK prior to the commencement of the Works. In the event that the surface is deemed unsuitable, then DK reserves the right to halt the Works until such time as it is agreed between DK and the Client as to the additional cost in further preparation of the surface in order to make it fit for waterproofing. The additional cost shall be charged as a variation to the quotation as per clause 7.2.
- 10.8 The Client acknowledges and accepts that:
- (a) DK shall apply the Materials to the manufacturer's specification and in compliance with all relevant industry standards; and
  - (b) DK may not be able to ascertain the depth of, or if a void or cavity is present behind a crack for repair without closer inspection. Any additional costs incurred by DK for carrying out such investigation prior to repairing such a defect shall be invoiced as an extra. The Client also accepts that repair methods may alter as a result of any such investigation; and
  - (c) DK gives no guarantee (expressed or implied) as to the length of time the curing process of repair Works will take due to factors or conditions outside DK's control (including, but not limited to, the surfaces and the existing condition of the defect, atmospheric conditions including humidity and temperature, the nature of the repair); and
  - (d) solid timber kitchens may have matching natural timber veneer internal panels and open shelves, as internal panels and open shelves cannot be made in solid timber; and
  - (e) engineered, stone, natural stone, solid surface and stainless steel benchtops may only be measured after cabinet installation and therefore will result in a delay in completion of approximately 5-10 working days (including but not limited to Materials being unavailable and reselection maybe necessary in accordance with clause 4 and 7.2).
- 10.9 Granite, marble engineered stone, limestone and glass have natural elements in the products that have naturally occurring variations in colour and shade tones, markings, and veining and may vary from colour samples provided. DK gives no guarantee (expressed or implied) that colour samples will match the Materials supplied. DK will make every effort to match colour samples to the Materials supplied but will not be liable in any way whatsoever for colour samples differing from the Materials supplied.
- 10.10 Marble, granite, limestone, quartzite and dolomite being porous products, are therefore, when supplied by DK are sealed for protection. However, oil and other acidic substances are prone to causing discolouration and staining if left on surfaces for some time. The Client agrees to indemnify DK against any damage occurring after delivery and installation.
- 10.11 Timber and veneer may exhibit variations in texture, shade, colour, surface, finish, markings, veining, and contain natural fissures, occlusions, and indentations. Whilst DK will make every effort to match sales samples to the finished Materials, DK accepts no liability whatsoever where such samples differ to the finished Materials supplied.
- 10.12 Timber is a hygroscopic material subject to expansion and contraction; therefore DK will accept no responsibility for gaps that may appear in the timber during prolonged dry periods.
- 10.13 The Client acknowledges that Materials supplied may:
- (a) expand, contract or distort as a result of exposure to heat, cold, weather; and
  - (b) mark or stain if exposed to certain substances; and

(c) be damaged or disfigured by impact or scratching.

10.14 The Client further accepts that:

- (a) the alignment of cabinetry joinery doors and carcasses may be affected by movement of homes or buildings; and
- (b) the polish finish of the Materials may be affected by environmental factors (including, but not limited to, humidity, weather, extreme heat etc.). Although DK will employ all possible measures to obtain a high quality finish, DK shall not be liable for any change in finish which is due to environmental factors; and
- (c) if not included in the original Contract and Price, the removal of an existing kitchen, (including but not limited to any electrical, plumbing, building work, Worksite preparation, the supply and/or fitting of appliances, range hoods or ducting, tapware, splashbacks, flooring or decorating work) will be shown as a variance in accordance with clause 7.2.

## 11. Dimensions, Plans and Specifications

- 11.1 All customary building industry tolerances shall apply to the dimensions and measurements of the Materials unless the Client and DK agree otherwise in writing.
- 11.2 DK shall be entitled to rely on the accuracy of any plans, specifications and other information provided by the Client.
- 11.3 If the giving of an estimate or quotation for the supply of Materials involves DK estimating measurements and quantities, it shall be the responsibility of the Client to verify the accuracy of DK's estimated measurements and quantities, before the Client places an order based on such estimate or accepts such quotation.
- 11.4 Should the Client require any changes to DK's estimated measurements and quantities, the Client shall request such changes in writing, in the case of an estimate before placing an order based on that estimate and in the case of a quotation before acceptance of that quotation.

## 12. Underground Locations

- 12.1 Prior to DK commencing any work the Client must advise DK of the precise location of all underground services on the Worksite and clearly mark the same. The underground mains and services the Client 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.
- 12.2 Whilst DK will take all care to avoid damage to any underground services the Client agrees to indemnify DK in respect of all and any liability claims, loss, damage, costs and fines as a result of damage to services not precisely located and notified as per clause 12.1.

## 13. Compliance with Laws and Planning and Building Approvals

- 13.1 The Client acknowledge that they are solely responsible for, and shall promptly obtain (taking all reasonable and necessary steps and at their own cost), all building approvals and consents (whether statutory or otherwise) that are necessary to enable DK to commence Works at the Worksite
- 13.2 The Client and DK 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 work health and safety laws (WHS) relating or any other relevant safety standards or legislation pertaining to the Works.
- 13.3 Both parties acknowledge and agree:
  - (a) to comply with the National Construction Code of Australia (NCC) and the Building Products (Safety) Act 2017, 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 the any current relevant Australian/New Zealand Standards applicable.
- 13.4 Where the Client has supplied products for DK to complete the Works, the Client acknowledges that it accepts responsibility for the suitability of purpose and are for their Intended Use and any faults inherent in those products. However, if in DK's opinion, it is believed that the materials supplied are Non-Conforming products and will not conform with state and/or territory regulations, then DK shall be entitled, without prejudice, to halt the Works until the appropriate conforming products are sourced and all costs associated with such a change to the plans and design will be invoiced in accordance with clause 7.2.
- 13.5 The Client shall obtain (at the expense of the Client) all licenses and approvals that may be required for the Works.
- 13.6 DK shall comply with the terms and conditions of all such consents and approvals in so far as such consents and approvals relate to the carrying out of the Works.

## 14. Insurance

- 14.1 DK shall have public liability insurance of at least five million (\$5m). It is the Client's responsibility to ensure that they are similarly insured.

## 15. Title

- 15.1 DK and the Client agree that ownership of the Materials shall not pass until:
  - (a) the Client has paid DK all amounts owing to DK; and
  - (b) the Client has met all of its other obligations to DK.

- 15.2 Receipt by DK 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.
- 15.3 It is further agreed that until ownership of the Materials passes to the Client in accordance with clause 15.1:
- (a) the Client is only a bailee of the Materials and unless the Materials have become fixtures must return the Materials to DK on request;
  - (b) the Client holds the benefit of the Client's insurance of the Materials on trust for DK and must pay to DK 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 DK shall be sufficient evidence of DK's rights to receive the insurance proceeds direct from the insurer without the need for any person dealing with DK to make further enquiries;
  - (d) the Client must not sell, dispose, or otherwise part with possession of the Materials other than in the ordinary course of business and for market value. If the Client sells, disposes or parts with possession of the Materials then the Client must hold the proceeds of any such act on trust for DK and must pay or deliver the proceeds to DK on demand;
  - (e) the Client should not convert or process the Materials or intermix them with other goods but if the Client does so then the Client holds the resulting product on trust for the benefit of DK and must sell, dispose of or return the resulting product to DK as it so directs;
  - (f) unless the Materials have become fixtures the Client irrevocably authorises DK to enter any premises where DK believes the Materials are kept and recover possession of the Materials;
  - (g) DK may recover possession of any Materials in transit whether or not delivery has occurred;
  - (h) the Client 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 DK;
  - (i) DK may commence proceedings to recover the Price of the Materials sold notwithstanding that ownership of the Materials has not passed to the Client.
- 16. Personal Property Securities Act 2009 ("PPSA")**
- 16.1 In this clause financing statement, financing change statement, security agreement, and security interest has the meaning given to it by the PPSA.
- 16.2 Upon assenting to these terms and conditions in writing the Client acknowledges and agrees that these terms and conditions constitute a security agreement for the purposes of the PPSA and creates a security interest in all Materials and/or collateral (account) – being a monetary obligation of the Client to DK for Works – that have previously been supplied and that will be supplied in the future by DK to the Client.
- 16.3 The Client undertakes to:
- (a) promptly sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which DK may reasonably require to:
    - (i) register a financing statement or financing change statement in relation to a security interest on the Personal Property Securities Register;
    - (ii) register any other document required to be registered by the PPSA; or
    - (iii) correct a defect in a statement referred to in clause 16.3(a)(i) or 16.3(a)(ii);
  - (b) indemnify, and upon demand reimburse, DK for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register established by the PPSA or releasing any Materials charged thereby;
  - (c) not register a financing change statement in respect of a security interest without the prior written consent of DK;
  - (d) not register, or permit to be registered, a financing statement or a financing change statement in relation to the Materials and/or collateral (account) in favour of a third party without the prior written consent of DK;
  - (e) immediately advise DK of any material change in its business practices of selling the Materials which would result in a change in the nature of proceeds derived from such sales.
- 16.4 DK and the Client agree that sections 96, 115 and 125 of the PPSA do not apply to the security agreement created by these terms and conditions.
- 16.5 The Client hereby waives its rights to receive notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA.
- 16.6 The Client waives its rights as a grantor and/or a debtor under sections 142 and 143 of the PPSA.
- 16.7 Unless otherwise agreed to in writing by DK, the Client waives its right to receive a verification statement in accordance with section 157 of the PPSA.
- 16.8 The Client shall unconditionally ratify any actions taken by DK under clauses 16.3 to 16.5.
- 16.9 Subject to any express provisions to the contrary (including those contained in this clause 16), nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.
- 17. Security and Charge**
- 17.1 In consideration of DK agreeing to supply the Materials, the Client 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 Client either now or in the future, to secure the performance by the Client of its obligations under these terms and conditions (including, but not limited to, the payment of any money).
- 17.2 The Client indemnifies DK from and against all DK's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising DK's rights under this clause.
- 17.3 The Client irrevocably appoints DK and each director of DK as the Client's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 17 including, but not limited to, signing any document on the Client's behalf.

**18. Defects, Warranties and Returns, Competition and Consumer Act 2010 (“CCA”)**

- 18.1 The Client must inspect all Materials on delivery (or the Works on completion) and must within seven (7) days of delivery notify DK in writing of any evident defect/damage, shortage in quantity, or failure to comply with the description or quote. The Client must notify any other alleged defect in the Materials/Works as soon as reasonably possible after any such defect becomes evident. Upon such notification the Client must allow DK to inspect the Materials or to review the Works provided.
- 18.2 Under applicable State, Territory and Commonwealth Law (including, without limitation the CCA), certain statutory implied guarantees and warranties (including, without limitation the statutory guarantees under the CCA) may be implied into these terms and conditions (**Non-Excluded Guarantees**).
- 18.3 DK acknowledges that nothing in these terms and conditions purports to modify or exclude the Non-Excluded Guarantees.
- 18.4 Except as expressly set out in these terms and conditions or in respect of the Non-Excluded Guarantees, DK makes no warranties or other representations under these terms and conditions including but not limited to the quality or suitability of the Materials/Works. DK’s liability in respect of these warranties is limited to the fullest extent permitted by law.
- 18.5 If the Client is a consumer within the meaning of the CCA, DK’s liability is limited to the extent permitted by section 64A of Schedule 2.
- 18.6 If DK is required to replace any Materials under this clause or the CCA, but is unable to do so, DK may refund any money the Client has paid for the Materials.
- 18.7 If DK is required to rectify, re-supply, or pay the cost of re-supplying the Works under this clause or the CCA, but is unable to do so, then DK may refund any money the Client has paid for the Works but only to the extent that such refund shall take into account the value of Works and Materials which have been provided to the Client which were not defective.
- 18.8 If the Client is not a consumer within the meaning of the CCA, DK’s liability for any defect or damage in the Materials is:
- (a) limited to the value of any express warranty or warranty card provided to the Client by DK at DK’s sole discretion;
  - (b) limited to any warranty to which DK is entitled, if DK did not manufacture the Materials;
  - (c) otherwise negated absolutely.
- 18.9 Subject to this clause 18, returns will only be accepted provided that:
- (a) the Client has complied with the provisions of clause 18.1; and
  - (b) DK has agreed that the Materials are defective; and
  - (c) the Materials are returned within a reasonable time at the Client’s cost (if that cost is not significant); and
  - (d) the Materials are returned in as close a condition to that in which they were delivered as is possible.
- 18.10 Notwithstanding clauses 18.1 to 18.9 but subject to the CCA, DK shall not be liable for any defect or damage which may be caused or partly caused by or arise as a result of:
- (a) the Client failing to properly maintain or store any Materials;
  - (b) the Client using the Materials for any purpose other than that for which they were designed;
  - (c) the Client continuing to use any Materials after any defect became apparent or should have become apparent to a reasonably prudent operator or user;
  - (d) interference with the Works by the Client or any third party without DK’s prior approval;
  - (e) the Client failing to follow any instructions or guidelines provided by DK;
  - (f) fair wear and tear, any accident, or act of God.
- 18.11 Notwithstanding anything contained in this clause if DK is required by a law to accept a return then DK will only accept a return on the conditions imposed by that law.
- 18.12 Subject to clause 18.1, customised, or non-stocklist items or Materials made or ordered to the Client’s specifications are not acceptable for credit or return.

**19. Materials, Documents and Works Supplied by the Owner**

- 19.1 The Owner:
- (a) warrants that any documentation supplied for the Works and the content or methods therein are accurate and/or suitable to be used for the purpose for which the document/s were created;
  - (b) agrees that it is reasonable for the Contractor to rely on the documentation;
  - (c) agrees to supply the Contractor with as many copies of the documentation as the Contractor may reasonably need to perform the Works or to obtain any necessary approvals required for the Works.
- 19.2 The Owner agrees that all materials and works supplied by the Owner or the Owner’s third party sub-contractors will:
- (a) be performed or supplied in accordance with all legislative requirements (including, but not limited to, the Building Products (Safety) Act 2017 and Work Health and Safety legislation);
  - (b) be suitable for their inclusion into the Works;
  - (c) be completed to the Contractor’s requirements.
- 19.3 The Contractor may, where the Contractor believes that any materials or works supplied by the Owner or any third party employed by the Owner are defective, require that the defective materials be replaced or require such works as are considered defective to be removed, repaired or replaced, the costs of which shall be the Owner’s responsibility.
- 19.4 Notwithstanding clause 19.3 the Contractor shall have no liability whatsoever in terms of the performance of, or suitability of, any materials or works supplied by either the Owner or any third party employee of the Owner.

- 19.5 In the event that the *Owner* undertakes or employs any third party to undertake any works at the *Worksite* whilst the *Contractor* is undertaking *Works* then the *Owner* must ensure that the *Owner* and/or any third party so employed:
- (a) is appropriately licensed for the works being undertaken, and will provide evidence of the same upon request by the *Contractor*;
  - (b) does not interfere with the progress of *Works* by the *Contractor*;
  - (c) holds all relevant insurances as the *Contractor* is required to hold or are otherwise required under this *Contract*;
  - (d) co-operates with all requests or directives of the *Contractor* in relation to the timeliness and co-ordination of works to be performed;
  - (e) co-operates as may be reasonably expected with all other persons on the *Worksite*;
  - (f) discusses any *Worksite* issues directly with the *Contractor* and not with any of the *Contractor's* employees.
- 19.6 In the event that the *Owner* or the *Owner's* third party employees do not comply with clauses 19.3 or 19.5 then the *Contractor* may require the non-compliant party to either leave and/or stay off the *Worksite* as the *Contractor* may so direct.
- 19.7 If the *Owner* breaches this clause, then the *Contractor* may (at the *Contractor's* sole discretion) either:
- (a) carry on the *Works* without incorporation of any *Owner* supplied materials or works;
  - (b) suspend the carrying out of the *Works* as per clause **Error! Reference source not found.**;
  - (c) terminate this *Contract* in accordance with clause **Error! Reference source not found.**

## 20. Foundations Data and Latent Conditions

- 20.1 This clause applies where the *Works*:
- (a) require the construction or alteration of footings, or a concrete slab, for a building; or
  - (b) may adversely affect the footings of a building or a concrete slab forming part of a building.
- 20.2 Before entering into the *Contract*, the *Contractor* must obtain the foundations data that is appropriate for the building *Worksite*, having regard to the following:
- (a) the Building Code of Australia;
  - (b) the need for a drainage plan;
  - (c) the need for engineer's drawings and computations;
  - (d) the need for information on the fall of the land at the building *Worksite*.
- 20.3 Nothing in clause 20.1 requires the *Contractor* to commission the preparation of foundations data to the extent the data already exists and it is reasonable for the *Contractor* to rely on the data.
- 20.4 The *Contractor* must give a copy of any foundations data obtained by the *Contractor* in compliance with this clause 20 to the *Owner* on payment by the *Owner* of the costs incurred by the *Contractor* in obtaining the data.
- 20.5 Clause 20.4 does not apply if:
- (a) the data is given to the *Contractor* by the *Owner*; or
  - (b) the *Contractor* reasonably believes the *Owner* already has a copy of the data.
- 20.6 The *Contractor* cannot seek from the *Owner* an amount not already provided for in the *Contract* if:
- (a) the *Contractor* entered into the *Contract* before obtaining the foundations data under clause 20.1; and
  - (b) the need for the additional amount could reasonably have been established, and the amount calculated, had the *Contractor* complied with clause 20.1.
- 20.7 For clause 20.6, an amount is not taken to be provided for in this *Contract* only because the *Contract* contains a provision allowing for an increase to be made in the *Contract Price*.
- 20.8 Nothing in this clause 20 prevents the *Contractor* from claiming an amount not provided for in the *Contract* if:
- (a) the *Contractor* has complied with clause 20.1; and
  - (b) the need for the additional amount cannot be established from the foundations data obtained by the *Contractor*.
- 20.9 The *Contractor* shall immediately on discovery of any latent condition at the *Worksite* advise the *Owner* of the nature of the condition and detail all the additional costs or *Works* required to rectify the condition (including any likely delays). Where the *Owner* is responsible under this *Contract* for additional costs due to latent conditions such notification shall be in the form of a variation which shall comply with clause **Error! Reference source not found.** herein.
- 20.10 Where the *Contractor* is responsible for additional costs due to latent conditions the *Contractor* shall not be liable for those costs if the *Works* required to rectify the condition have already been allowed for in this *Contract* as a Provisional Sum.

## 21. Intellectual Property

- 21.1 Where DK has designed, drawn, written plans or a schedule of *Works*, or created any products for the Client, then the copyright in all such designs, drawings, documents, plans, schedules and products shall remain vested in DK, and shall only be used by the Client at DK's discretion. Under no circumstances may such designs, drawings and documents be used without the express written approval of DK.
- 21.2 The Client warrants that all designs, specifications or instructions given to DK will not cause DK to infringe any patent, registered design or trademark in the execution of the Client's order and the Client agrees to indemnify DK against any action taken by a third party against DK in respect of any such infringement.
- 21.3 The Client agrees that DK may (at no cost) use for the purposes of marketing or entry into any competition, any documents, designs, drawings, plans or products which DK has created for the Client.



## **22. Default and Consequences of Default**

- 22.1 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 DK's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 22.2 If the Client owes DK any money the Client shall be liable for, and indemnify DK from and against all costs and disbursements incurred by DK in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, DK's contract default fee, and bank dishonour fees).
- 22.3 Further to any other rights or remedies DK may have under this Contract, if a Client has made payment to DK, and the transaction is subsequently reversed, the Client shall be liable for the amount of the reversed transaction, in addition to any further costs incurred by DK under this clause 22 where it can be proven that such reversal is found to be illegal, fraudulent or in contravention to the Client's obligations under this Contract.
- 22.4 Without prejudice to DK's other remedies at law DK shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to DK shall, whether or not due for payment, become immediately payable if:
- (a) any money payable to DK becomes overdue, or in DK's opinion the Client will be unable to make a payment when it falls due;
  - (b) the Client has exceeded any applicable credit limit provided by DK;
  - (c) the Client 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 Client or any asset of the Client.

## **23. Cancellation**

- 23.1 Without prejudice to any other remedies DK may have, if at any time the Client is in breach of any obligation (including those relating to payment) under these terms and conditions DK may suspend or terminate the supply of Works to the Client. DK will not be liable to the Client for any loss or damage the Client suffers because DK has exercised its rights under this clause.
- 23.2 DK 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 Client. On giving such notice DK shall repay to the Client any sums paid in respect of the Price, less any amounts owing by the Client to DK for Works already performed. DK shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 23.3 In the event that the Client cancels the delivery of Works the Client shall be liable for any and all loss incurred (whether direct or indirect) by DK as a direct result of the cancellation (including, but not limited to, any loss of profits).
- 23.4 Cancellation of orders for products made to the Client's specifications, or for non-stocklist items, will definitely not be accepted once production has commenced, or an order has been placed.

## **24. Dispute Resolution**

- 24.1 If a dispute arises between the parties to this Contract, then either party shall send to the other party a notice of dispute in writing adequately identifying and providing details of the dispute. Within fourteen (14) days after service of a notice of dispute, the parties shall confer at least once, to attempt to resolve the dispute. At any such conference each party shall be represented by a person having authority to agree to a resolution of the dispute. In the event that the dispute cannot be so resolved either party may by further notice in writing delivered by hand or sent by certified mail to the other party refer such dispute to arbitration. Any arbitration shall be:
- (a) referred to a single arbitrator to be nominated by the President of the Institute of Arbitrators Australia; and
  - (b) conducted in accordance with the Institute of Arbitrators Australia Rules for the Conduct of Commercial Arbitration.

## **25. Building and Construction Industry Security and Payments Act 1999**

- 25.1 At DK's sole discretion, if there are any disputes or claims for unpaid Works and/or Materials then the provisions of the Building and Construction Industry Security and Payments Act 1999 may apply.
- 25.2 Nothing in this Contract is intended to have the effect of contracting out of any applicable provisions of the Building and Construction Industry Security of Payments Act 1999 of New South Wales, except to the extent permitted by the Act where applicable.

## **26. Privacy Policy**

- 26.1 All emails, documents, images or other recorded information held or used by DK is Personal Information, as defined and referred to in clause 26.3, and therefore considered Confidential Information. DK acknowledges its obligation in relation to the handling, use, disclosure and processing of Personal Information pursuant to the Privacy Act 1988 ("the Act") including the Part IIIC of the Act being Privacy Amendment (Notifiable Data Breaches) Act 2017 (NDB) and any statutory requirements, where relevant in a European Economic Area ("EEA"), under the EU Data Privacy Laws (including the General Data Protection Regulation "GDPR") (collectively, "EU Data Privacy Laws"). DK acknowledges that in the event it becomes aware of any data breaches and/or disclosure of the Client's Personal Information, held by DK that may result in serious harm to the Client, DK will notify the Client in accordance with the Act and/or the GDPR. Any release of such Personal Information must

be in accordance with the Act and the GDPR (where relevant) and must be approved by the Client by written consent, unless subject to an operation of law.

- 26.2 Notwithstanding clause 26.1, privacy limitations will extend to DK in respect of Cookies where the Client utilises DK's website to make enquiries. DK 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 Client's:
- (a) IP address, browser, email client type and other similar details;
  - (b) tracking website usage and traffic; and
  - (c) reports are available to DK when DK sends an email to the Client, so DK may collect and review that information ("collectively Personal Information")
- If the Client consents to DK's use of Cookies on DK's website and later wish to withdraw that consent, the Client may manage and control DK's privacy controls via the Client's web browser, including removing Cookies by deleting them from the browser history when exiting the site.
- 26.3 The Client agrees for DK to obtain from a credit reporting body (CRB) a credit report containing personal credit information (e.g. 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) about the Client in relation to credit provided by DK.
- 26.4 The Client agrees that DK may exchange information about the Client with those credit providers and with related body corporates for the following purposes:
- (a) to assess an application by the Client; and/or
  - (b) to notify other credit providers of a default by the Client; and/or
  - (c) to exchange information with other credit providers as to the status of this credit account, where the Client is in default with other credit providers; and/or
  - (d) to assess the creditworthiness of the Client including the Client's repayment history in the preceding two (2) years.
- 26.5 The Client consents to DK being given a consumer credit report to collect overdue payment on commercial credit.
- 26.6 The Client agrees that personal credit information provided may be used and retained by DK for the following purposes (and for other agreed purposes or required by):
- (a) the provision of Works; and/or
  - (b) analysing, verifying and/or checking the Client's credit, payment and/or status in relation to the provision of Works; and/or
  - (c) processing of any payment instructions, direct debit facilities and/or credit facilities requested by the Client; and/or
  - (d) enabling the collection of amounts outstanding in relation to the Works.
- 26.7 DK may give information about the Client to a CRB for the following purposes:
- (a) to obtain a consumer credit report;
  - (b) allow the CRB to create or maintain a credit information file about the Client including credit history.
- 26.8 The information given to the CRB may include:
- (a) Personal Information as outlined in 26.3 above;
  - (b) name of the credit provider and that DK is a current credit provider to the Client;
  - (c) whether the credit provider is a licensee;
  - (d) type of consumer credit;
  - (e) details concerning the Client's application for credit or commercial credit (e.g. date of commencement/termination of the credit account and the amount requested);
  - (f) advice of consumer credit defaults, overdue accounts, loan repayments or outstanding monies which are overdue by more than sixty (60) days and for which written notice for request of payment has been made and debt recovery action commenced or alternatively that the Client no longer has any overdue accounts and DK has been paid or otherwise discharged and all details surrounding that discharge (e.g. dates of payments);
  - (g) information that, in the opinion of DK, the Client has committed a serious credit infringement;
  - (h) advice that the amount of the Client's overdue payment is equal to or more than one hundred and fifty dollars (\$150).
- 26.9 The Client shall have the right to request (by e-mail) from DK:
- (a) a copy of the Personal Information about the Client retained by DK and the right to request that DK correct any incorrect Personal Information; and
  - (b) that DK does not disclose any Personal Information about the Client for the purpose of direct marketing.
- 26.10 DK will destroy Personal Information upon the Client'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.
- 26.11 The Client can make a privacy complaint by contacting DK via e-mail. DK 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 thirty (30) days of receipt of the complaint. In the event that the Client is not satisfied with the resolution provided, the Client can make a complaint to the Information Commissioner at [www.oaic.gov.au](http://www.oaic.gov.au).

## 27. Service of Notices

- 27.1 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.

27.2 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.

## **28. Trusts**

28.1 If the Client at any time upon or subsequent to entering in to the Contract is acting in the capacity of trustee of any trust ("Trust") then whether or not DK may have notice of the Trust, the Client covenants with DK as follows:

- (a) the Contract extends to all rights of indemnity which the Client now or subsequently may have against the Trust and the trust fund;
- (b) the Client 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 Client against the Trust or the trust fund. The Client 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 Client will not without consent in writing of DK (DK will not unreasonably withhold consent), cause, permit, or suffer to happen any of the following events:
  - (i) the removal, replacement or retirement of the Client 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.

## **29. General**

29.1 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.

29.2 These terms and conditions and any contract to which they apply shall be governed by the laws of New South Wales, the state in which DK has its principal place of business, and are subject to the jurisdiction of the courts in Blacktown, New South Wales.

29.3 Subject to clause 18, DK shall be under no liability whatsoever to the Client for any indirect and/or consequential loss and/or expense (including loss of profit, cost of time for any inconveniences, rent, meals, etc.) suffered by the Client arising out of a breach by DK of these terms and conditions (alternatively DK's liability shall be limited to damages which under no circumstances shall exceed the Price of the Works).

29.4 DK may licence and/or assign all or any part of its rights and/or obligations under this Contract without the Client's consent.

29.5 The Client cannot licence or assign without the written approval of DK.

29.6 DK 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 Client agrees and understands that they have no authority to give any instruction to any of DK's sub-contractors without the authority of DK.

29.7 The Client agrees that DK may amend their general terms and conditions for subsequent future contracts with the Client by disclosing such to the Client in writing. These changes shall be deemed to take effect from the date on which the Client accepts such changes, or otherwise at such time as the Client makes a further request for DK to provide Works to the Client.

29.8 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, pandemic, fire, flood, storm or other event beyond the reasonable control of either party.

29.9 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.

## 5 YEAR EXTENDED WARRANTY

DK warrants to the Client whose name appears on this Contract that the products be free of faults in materials and manufacture for a further 5 years with the following exceptions/exclusions:

1. Normal wear and tear
2. Accidental or intentional abuse or misuse
3. Exposure to: excessive moisture, variations in temperature, humidity, sunlight, abrasion, impact, vibration, heavy loads, harmful chemicals including, but not limited to: cleaning agents, food acids, wine and cooking oils
4. Trade work: Plumbing, gas fitting, ducting, electrical, lighting, plastering and tiling
5. Inherent characteristics of natural materials
6. Distortion due to building settlement or movement
7. Damage caused by vermin
8. Problems arising from unauthorised installation or maintenance
9. Materials/Products warranted by any supplier to DK but where that warranty is withdrawn by the supplier for whatever reason
10. Consequential Loss
11. Labour costs involved in the replacement of any part, accessory or mechanism supplied by DK after twelve (12) months from the date of the issue of this Warranty
12. This extended Warranty is not transferable

Degabriele Kitchens NSW Pty Ltd provides this extended warranty for five years. The period of cover commences on the date shown on the '12 Year Guarantee' certificate which will be issued to you upon completion of this Contract.