



## Vesuvius New Zealand Limited Company Number 116540

### TERMS OF SALE OF PRODUCTS - LOCAL Effective 1 July 2016

**These Terms of Sale form part of every sale of Products by the Seller and by accepting Delivery of any Products, you (the Purchaser) acknowledges that the Products are purchased upon these Terms of Sale.**

As used herein, the word:

**"Affiliate"** means any corporation, company, partnership, limited partnership, limited liability company, joint venture, or other form of enterprise, which controls, is controlled by, or is under common control with, a Party.

**"Contract"** means the acceptance of an Order by the Seller in accordance the Terms of Sale.

**"Control"** means when used as a verb, means the ability, directly or indirectly through one or more intermediaries, to direct or cause the direction of the management and policies of such entity through (i) legal or beneficial ownership of voting securities or membership interests; (ii) the right to appoint managers, directors or corporate management; (iii) contract; (iv) operating agreement; (v) voting trust; or otherwise; and when used with respect to a person, means the actual or legal ability to control the actions of that person; and when used as a noun means an interest which gives the holder the ability to exercise any of the foregoing powers.

**"Delivery"** or **"Delivered"** means the taking and uploading of Product to the Delivery Point by the Delivery Means.

**"Delivery Means"** means the method of Delivery determined by the Seller.

**"Delivery Point"** means the location specified in an Order as the place for Delivery.

**"Order"** means the purchase order for Products issued by the Purchaser.

**"Products"** means the goods and or Products ordered by Purchaser and sold by the Seller on these Terms of Sale.

**"Purchaser"** means a person, firm or corporation which has ordered the supply of Products from the Seller.

**"Seller"** means Vesuvius New Zealand Limited 116540.

**"Specifications"** means the specifications, qualities, nature, type, properties, amounts, assortments, and other descriptions of and requirements for the Products as specified or as advised by the Seller.

**"Supply"** and **"Supplied"** includes sale and Delivery of Product and vice versa.

**"Terms of Sale"** means the provisions hereto which constitute the provisions of the terms and conditions of sale between the Seller and the Purchaser.

**"Website"** means the website being [www.foseco.com.au](http://www.foseco.com.au) upon which these Terms of Sale can be read at any time.

The singular number includes the plural and vice versa; the masculine gender includes the other genders and words denoting persons including corporations, unless the context otherwise requires.

**1. Order.** An Order is the order of the Purchaser to buy Products from the Seller. Each Order of the Purchaser is open for acceptance by the Seller. Each Order is firm and may not be changed or revoked at any time before acceptance or rejection by the Seller.

**2. Acceptance of Order and Contract formation.** The Seller accepts an Order as soon as the first of the following occurs: (a) the

Seller informs the Buyer in writing that it accepts the Order in part or completely; or (b) the Seller Delivers the Products the subject of an Order, in part or completely. The Seller reserves the right to accept each Order in whole or in part or to decline an Order. Where Products Delivered are part only of an Order, the Terms of Sale shall apply to the Products Supplied. Acceptance of an Order by the Seller is expressly limited to the Terms of Sale contained in the credit application executed by Purchaser or the Terms of Sale last advised as applying by the Seller. No variation to the Terms of Sale shall become part of Contract, unless assented to in writing by the Seller. The terms or provisions in, or of, any Order shall not vary the Terms of Sale in any way. As each Order issued by the Purchaser is subject to acceptance by the Seller, a Contract will only be formed when the Seller has accepted the Purchaser's offer to buy pursuant to this clause.

**3. Non-Cancellation of Orders.** An Order for Products submitted by Purchaser and accepted by the Seller shall not be subject to cancellation, and if the Purchaser attempts to cancel or refuses to accept Delivery, the Seller shall be entitled in addition to all other remedies afforded to the Seller to recover the full sale price from Purchaser.

**4. Price and Payment.** Prices for the Products shall be the list price for the Products as at the date of acceptance of the Order unless otherwise agreed in writing by the Seller. Invoices for Products shall contain the following information, where appropriate: Order number, item number, description of the Products, quantities, and unit prices. All supporting papers, including bills of lading and express receipts, shall accompany invoices. Invoices shall be forwarded upon shipment or completion of Supply. Payment will be due 30 days following the date of invoice. Payment for the Products shall constitute acceptance thereof. The Seller reserves the right to vary prices from time to time at its discretion and without notice.

**5. Taxes and Expenses.** The Purchaser shall be responsible for all sales, consumer, use and other similar taxes and any other expenses resulting from exchange rate fluctuations, custom charges, shortages or such other costs or expenses imposed on the Seller for the Supply of Products which are not included in the price and which shall be the responsibility of Purchaser or, where the payment of the expenses is the legal responsibility of the Seller, the price shall be increased by the amount of such expenses. Any increase in the amount of the expenses between the date of any quotation and the date of Delivery of the Products shall be the responsibility of Purchaser and the price shall be increased accordingly and debited to Purchaser's account (if any).

**6. Deliveries.** The Products shall be Delivered at no additional cost to the Purchaser to the destination indicated on the Order unless otherwise specified in writing. All packaging will meet the commercial standards of the Seller and accepted industry practices to ensure against damage to and for full protection of the Products. The Purchaser shall be responsible for all



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demurrage and shall be solely responsible for unloading, checking and storage of the Products covered by each Order. Time is not of the essence with respect to Supply of the Products.

**7. Inspection on Delivery.** The Purchaser must immediately upon receipt of Products inspect the Products to determine whether the correct type, quantity and package sizes of the Products have been Delivered. The Purchaser by acknowledging receipt of Products is expressly undertaking that the Purchaser has inspected the Products and the Products are in good order. Failure to notify the Seller of any potential claim will be taken to constitute a waiver of any such claim that could, but for this clause, have been made against the Seller.

**8. Warranties Exclusions.** The Seller expressly warrants that all the Products Supplied conform to the Specifications, upon Delivery. All conditions and warranties on the part of the Seller implied by law in relation to the Products Supplied by it are excluded to the maximum extent permitted by law and the provisions contained in these Terms of Sale shall constitute the whole of the rights and obligations of the parties. To the extent that the Seller may be liable for a breach of condition or warranty under of Part I of the Consumer Guarantees Act 1993 (other than a condition or warranty implied by section 5 of the Act) the liability of the Seller shall be limited to the replacement of the Products concerned or the Supply of equivalent Products whichever is determined by the Seller and all liability of the Seller for damages including consequential indirect or special damage or loss of whatever kind is excluded to the maximum extent permitted by law.

**9. Termination.** The Seller may terminate an Order by giving notice to the Purchaser, effective immediately upon such notice, on the happening of any one or more of the following events: (a) Purchaser fails to pay for any earlier Order on time or is in default under or breach of any other term or condition of an Order or any prior Order; (b) any applicable law prevents full compliance with the Terms of Sale by the Seller; or (c) commencement of voluntary or involuntary proceedings under any bankruptcy, reorganization or similar laws of any jurisdiction by or against the Purchaser, or if any order shall be made or any resolution passed for the winding up, liquidation or dissolution of the Purchaser, or if a receiver be appointed for it or its property, or if any of its the Products or properties shall be taken in execution. Additionally, the Seller shall have the right at any time and from time to time without cause, to terminate all or any part of the undelivered portion of an Order, effective upon written notice to Purchaser, provided that the Seller shall be responsible for Purchaser's actual out-of-pocket costs reasonably incurred in reliance on the Order until the date of such termination.

**10. Waiver.** The Seller's purported waiver of any breach, or failure to enforce, any of the Terms of Sale at any time, shall not in any way affect, limit, or waive the Seller's rights thereafter to

enforce and compel strict compliance with every term and condition hereof. No waiver of any provision of these Terms of Sale shall be valid unless such waiver is in writing and signed by the Seller.

**11. Title.** Until the Purchaser has paid all monies owed to the Seller then ownership of the Products sold by the Seller to Purchaser under the Terms of Sale remains with the Seller; and the Purchaser: (a) shall hold the Products in its possession or that of its employees or agents, as bailee of the Seller; (b) if any of the Products are sold by the Purchaser then such sale shall be as an agent for the Seller and the Purchaser shall hold the proceeds of sale on behalf of the Seller and shall pay them to the Seller on request and any agreement by the Seller to extend credit to the Purchaser or any other indulgence shall not affect the Purchaser's liability to account to the Seller or the ownership of the material by the Seller; and (c) shall if the Seller so requires, agree to store the Products so as to show clearly that the Products are the Seller's property and shall keep the Products fully insured at the Purchaser's own expense and shall hold the proceeds of any insurance claim in respect of the Products (to the extent of the Purchaser's indebtedness to the Seller) in trust for the Seller; and (d) upon any default by the Purchaser to pay any amount due to the Seller, the Purchaser irrevocably authorises the Seller by its employees or agents to enter any premises owned, leased or otherwise occupied by the Purchaser, any agent, Affiliate or associate of the Purchaser for the purpose of taking possession of the Products and hereby authorises the Seller by its employees or agents to use all reasonable force to obtain such possession.

**12. Security Interest.** The Products and all of the Purchaser's present and future rights in relation to the Products, are subject to a continuing security interest in favour of the Seller for the payment of all amounts owing under these Terms of Sale and the performance of all obligations under these Terms of Sale. The terms **financing statement**, **financing change statement**, **verification statement** and **security interest** have the meanings given to them under the Personal Property Securities Act (PPSA). The Purchaser shall promptly when requested by the Seller execute any documents and do anything required by the Seller to ensure that the security interest created by these Terms of Sale constitutes a first ranking perfected security interest over the Products supplied and the proceeds of sale including providing any information the Seller requires to complete a financing statement or financing change statement. The Purchaser waives the right to receive a copy of the verification statement under the PPSA. The Seller and the Purchaser agree that nothing in Sections 114(1)(a) and 134 of the PPSA will apply to these Terms of Sale. The Purchaser agrees that the rights of the Purchaser as debtor in Sections 120(2), 121, 125, 126, 127, 129 and 131 of the PPSA shall not apply to these Terms of Sale. The Purchaser acknowledges that it has received a copy of these Terms of Sale and in particular that the terms contained herein constitute a security agreement for the purposes of the PPSA. The Purchaser acknowledges that



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the description of Products supplied over which a security is claimed includes all Products that may be described in any invoice rendered to the Purchaser by the Seller.

**13. Passing of Risk.** Notwithstanding anything in the Terms of Sale, risk in the Products passes to the Purchaser upon Delivery of the Products by the Seller to the Purchaser, its employees or agents.

**14. Interest on Overdue Money.** The Purchaser shall pay to the Seller interest at the rate of 2% above the HSBC Limited indicator rate from time to time on all monies not paid by the Purchaser to the Seller on a due date and such interest shall be calculated on daily rests from the due date for payment.

**15. Clear Funds.** Receipt of a cheque, other negotiable instrument by the Seller shall not constitute payment and the Purchaser shall remain liable for the full agreed price until such cheque or negotiable instrument is paid in full.

**16. Default Payments.** Without prejudice to any other rights available to the Seller, the Purchaser shall be liable for any legal or other collection costs on overdue accounts.

**17. Privacy Information.** The Purchaser acknowledges that: (a) all information provided by it or obtained by the Seller will be held by the Seller subject to Purchaser's right (if any) of access to and correction of such information provided by any law; (b) information relating to the Terms of Sale may be disclosed to a credit reporting agency. Such information may include the fact that the Purchaser has applied for credit with the Seller, any overdue payments which are in collection and cheques or other negotiable instruments that have been dishonoured; and (c) the Seller may request from a credit reporting agency, or any financial institutions or credit providers whose names are given to it, or whose names are included in a credit report about the Purchaser, credit information about the Purchaser's commercial finances. The Purchaser permits such institutions to provide such information to the Seller. In particular, the Purchaser consents to the Seller obtaining and receiving such information for the purposes of approving any application of the Purchaser for credit from the Seller. The Purchaser also acknowledges and agrees that information about its financial and commercial affairs may be transferred confidentially within the Seller and any of its Affiliates, associated or related corporations worldwide, and that the Seller may be legally obliged to disclose such information to others. If the Seller is so obliged, pursuant to an appropriate authority, the Seller will use its best efforts to notify the Purchaser at the last known address known to the Seller prior to disclosure.

**18. Force Majeure.** The Seller shall not be liable for delay in Delivery of the Products, or for any other interruption, delay, loss, or damage which is incurred or suffered as a result of a Force Majeure, and the Seller's obligations hereunder shall be excused

and suspended during the period such Force Majeure remains in effect. "Force Majeure" shall mean a condition or cause beyond the reasonable control of the Seller, including but not limited to acts of God, including floods, storms, earthquakes, hurricanes, tornadoes, or other severe weather or climatic conditions; plant shutdown; acts of public enemy, war, blockade, insurrection, or riot; fire, wreck, washout or explosion; strike, lockout, or labor dispute; embargoes or governmental laws, orders, or regulations; equipment failure; shortage of energy or raw materials; act of governmental authority, or compliance with governmental laws and regulations; or circumstance beyond the Seller's control not enumerated in the foregoing which reasonably shall prevent the Seller from performing its obligations in the usual and normal course of its business. The Seller may terminate an Order, without penalty, if Force Majeure continues longer than three months.

**19. Intellectual Property.** The Purchaser shall indemnify defend and hold harmless the Seller and its Affiliates against all actions, costs (including the cost of defending any legal proceedings) claims proceedings, accounts and damages in respect of any infringement or alleged infringement of any patent, registered design, copyright, trade mark or other industrial or intellectual property rights resulting from compliance by the Seller with the Purchaser's instructions whether express or implied.

**20. Severability and Reformation.** If any of the provisions of these Terms of Sale shall be held to be invalid or unenforceable in whole or in part, those provisions to the extent enforceable and all other provisions shall nevertheless continue to be valid and enforceable as though the invalid or unenforceable parts had not been included in this Contract.

**21. Terms of Sale.** The Terms of Sale applying to each Order shall be those at the date of the Seller's acceptance of an Order. The Purchaser acknowledges that such Terms of Sale may be different for Orders made at different dates. By signing an acknowledgement of acceptance, agreeing to such Terms of Sale by email, or placing an Order with the Seller the Purchaser assents to be bound by the latest edition of the Terms of Sale as published on the Website at the time of the Order.

**22. Modification of Terms of Sale.** The Seller reserves the right to change, modify, add or remove any part of the Terms of Sale and to add to, change or discontinue any material or information contained in, or any other aspect of, the Website at any time and without notice or liability. By agreeing to these Terms of Sale the Purchaser is expressly agreeing to check the Website regularly for changes in the Terms of Sale.

**23. Complete Terms of Sale; Governing Law.** The Terms of Sale referred to herein supersede all prior understandings, transactions, and communications, whether oral or written, with respect to the matters referred to herein and form the complete



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contract between the Seller and the Purchaser. No modification, alteration, or amendment of the Terms of Sale contained in any Order shall be binding upon the Seller unless accepted in writing and signed by the Seller's authorized representative. The Terms of Sale shall be interpreted, construed and governed by the laws of New Zealand.

The headings above are provided for convenience only and will not affect the construction or interpretation of these Terms of Sale.