



## Vesuvius New Zealand Limited Company Number 116540

### TERMS OF SALE OF PRODUCTS – ON CONSIGNMENT Effective 1 July 2016

These Terms of Sale form part of every sale of Consignment Stock and sale of Products by the Seller and by accepting Delivery of any Consignment of Stock, you (the Customer) acknowledges that the supply of Consignment Stock and the purchase of Products is 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.

“**Agreement**” means the agreement evidenced by these Terms of Sale/Consignment.

“**Consignment Stock**” means the goods of the Seller Delivered and kept at the premises of the Customer.

“**Control**” 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.

“**Customer**” means a person, firm or corporation which has Consignment Stock in its custody, control or possession.

“**Delivery**” or “**Delivered**” means the point in time when the Seller (including its agent) delivers the Consignment Stock (including initial stock and any further deliveries) at the premises of the Customer as advised by the Customer and accepted by the Seller as the place for delivery.

“**Products**” means the items taken from Consignment Stock by the Customer under these Terms of Sale.

“**Removal Note**” the notification that the Customer is to send to Seller advising of Products it has taken from Consignment Stock.

“**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/Consignment**” means the provisions hereto which constitute the provisions of the terms and conditions of sale between the Seller and the Customer.

“**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 includes corporations, unless the context otherwise requires.

1. **Acceptance of Consignment Stock.** The Customer acknowledges that the Consignment Stock is the property of the Seller and any item taken from the Consignment Stock remains the property of the Seller until the Seller has received full payment of the purchase price and any monies due from the Customer to the Seller on any accounts. The Customer shall check the Consignment Stock products upon Delivery for quantity and quality. Any

difference in quantity shall be agreed and noted for appropriate action. Any items found to be defective shall be returned to the Seller at the Seller's cost.

2. **Storage of Consignment Stock.** The Customer will hold the stock on behalf of the Seller in a designated storage area separate from the Customer's own inventory and other property and will store such stock in accordance with the conditions and practices as specified or advised by the Seller, including without removing labels and identifying marks.
3. **Risk and Insurance of Consignment Stock.** Any loss or damage occurring to Consignment Stock shall be at the Customer's risk and the Seller shall invoice the Customer for items so lost or damaged at the full purchase price. The Customer will insure the stock with a reputable Insurance Company against all customary perils for the benefit of the Seller at the Customer's own expense (and must if the Seller so requires, produce a copy of the Certificate of Insurance) and shall hold the proceeds of any insurance claim in respect of the Products (to the extent of Customer's indebtedness to the Seller) in trust for the Seller. If settlement of any insurance claim arising from these perils is refused, the Seller shall invoice the Customer for the value of the stock so lost, damaged or destroyed. Upon any default by the Customer to pay any amount due to the Seller, the Customer irrevocably authorises the Seller by its employees or agents to enter any premises owned, leased or otherwise occupied by Customer, any agent, Affiliate or associate of the Customer 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
4. **Inventory of Consignment Stock.** The Consignment Stock will be counted on a regular monthly basis by a representative of the Customer, normally and where practical in conjunction with a representative of the Seller. In any event, a joint inspection and stock count will be performed every three months. The Seller reserves the right, at any reasonable time and upon giving notice of one working day, to inspect and count the Consignment Stock.
5. **Monthly Reports.** The Customer, on a regular monthly basis, shall provide the Seller with a schedule, in a format prescribed by the Seller, detailing the volumes of product removed from the Consignment Stock. The Seller shall issue an invoice to the Customer for products used as detailed in such schedule.



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6. **Replenishment of Consignment Stock.** Replenishment of the Consignment Stock will only be made subject to the Seller having received full payment from the Customer for all amounts due, in accordance with the agreed payment terms. The Seller shall endeavour to replenish stock as requested subject to prevailing lead-times, delivery dates and minimum quantities.
7. **Purchase.** Upon taking items of Consignment Stock the Customer shall issue to the Seller a Removal Note. The Customer agrees to use the Consignment Stock on a first in, first out basis. Items removed from Consignment Stock shall be deemed purchased by the Customer in accordance with these Terms of Sale/Consignment agreed between the Seller and the Customer.
8. **Price and Payment.** Unless otherwise agreed in writing between Seller and Customer prices for the Products shall be the list price for the Products as at the date of each Removal Note. Each invoice for Products shall be for those Products purchased in the preceding month as advised by the Customer under clause 5 (subject to a joint inspection and stock count in accordance with clause 4). Payment will be due 30 days following the date of invoice. The Seller reserves the right to vary prices from time to time at its discretion and without notice.
9. **Consignment Stock held for 3 Months.** The Customer agrees to Purchase any items that are 'slow moving'. Any items of Consignment Stock that have not been used or invoiced during the period of three consecutive months shall be deemed 'slow moving' and the Seller will invoice the Customer accordingly.
10. The Customer agrees to Purchase any items of Consignment Stock that are no longer required due to any change in specification or circumstance (for example: quality, type, size, termination of agreement, etc.). This includes items in Consignment Stock with the Customer and items for the Customer in Seller's stock or in process of procurement with the Seller, for which the Seller has no other acceptable means of sale ("Custom Products").
11. **Taxes and Expenses.** The Customer 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 the Customer 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.
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/Consignment and the performance of all obligations under these Terms of Sale/Consignment. 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/Consignment 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/Consignment. 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/Consignment. The Purchaser acknowledges that it has received a copy of these Terms of Sale/Consignment and in particular that the terms contained herein constitute a security agreement for the purposes of the PPSA. The Purchaser acknowledges that 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. **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/Consignment shall constitute the whole of the rights and obligations of the parties. 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.



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14. **Termination.**

- a. Either party may terminate this Agreement by giving to the other three months notice in writing.
- b. The Seller may terminate this Agreement by giving notice to Customer, effective immediately upon such notice, on the happening of any one or more of the following events: (a) Customer fails to pay any amount on time or is in default under or in breach of any other term or condition of this Agreement; (b) any applicable law prevents full compliance with the Terms of Sale/Consignment by the Seller; or (c) commencement of voluntary or involuntary proceedings under any bankruptcy, reorganization or similar laws of any jurisdiction by or against Customer, or if any order shall be made or any resolution passed for the winding up, liquidation or dissolution of Customer, or if a receiver be appointed for it or its property, or if any of its products or properties shall be taken in execution.

15. **Consequences of Termination.** Upon termination of this Agreement the entire price of the Consignment Stock supplied to the Customer shall become due and payable at the prices then prevailing, subject to the Customer, at its own cost and risk and within five working days, returning any remaining products (other than Custom Products) that are in good and saleable condition to the Supplier.

16. **Waiver.** The Seller's purported waiver of any breach, or failure to enforce, any of the Terms of Sale/Consignment 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/Consignment shall be valid unless such waiver is in writing and signed by the Seller.

17. **Interest on Overdue Money.** The Customer 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 Customer to the Seller on a due date and such interest shall be calculated on daily rests from the due date for payment.

18. **Clear Funds.** Receipt of a cheque, or other negotiable instrument by the Seller shall not constitute payment and the Customer shall remain liable for the full price,

determined under clause 8, until such cheque or negotiable instrument is paid in full.

19. **Bank Guarantee.** The Seller may require and if so the Customer shall provide, a bank guarantee in an amount equivalent to the price of the full number of products which the Customer requires as Consignment Stock from time to time.

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

21. **Privacy Information.** The Customer acknowledges that: (a) all information provided by it or obtained by the Seller will be held by the Seller subject to Customer's right (if any) of access to and correction of such information provided by any law; (b) information relating to the Terms of Sale/Consignment may be disclosed to a credit reporting agency. Such information may include the fact that the Customer 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 Customer, credit information about the Customer's commercial finances. The Customer permits such institutions to provide such information to the Seller. In particular, the Customer consents to the Seller obtaining and receiving such information for the purposes of approving any application of the Customer for credit from the Seller. The Customer also acknowledges and agrees that information about its financial and commercial affairs may be transferred confidentially within the Seller and any of its 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 Customer at the last known address known to the Seller prior to disclosure.

22. **Force Majeure.** The Seller shall not be liable for delay in Delivery of the initial or any replenishment to Consignment Stock, 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,



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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 listed above which reasonably shall prevent the Seller from performing its obligations in the usual and normal course of its business. The Seller may terminate this agreement in full or in part, without penalty, if Force Majeure continues longer than three months.

23. **Patents.** The Customer 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 Customer's instructions whether express or implied.
24. **Severability and Reformation.** If any of the provisions of these Terms of Sale/Consignment 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.
25. **Terms of Sale/Consignment.** The provisions of the Terms of Sale/Consignment applying in each case shall be those at the date of a Removal Note. The Customer acknowledges that the Terms of Sale/Consignment may be different at different dates. By signing an acknowledgement of acceptance, agreeing to the Terms of Sale/Consignment by email, or allowing Consignment Stock on its premises, the Customer assents to be bound by the latest edition of the Terms of Sale/Consignment as published on the Website at the time of issue of a Removal Note.
26. **Modification of Terms of Consignment.** The Seller reserves the right to change, modify, add or remove any part of the Terms of Sale/Consignment 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 the Terms of Sale/Consignment the Customer is expressly agreeing to check the Website

regularly for changes in the Terms of Sale/Consignment.

27. **Complete Terms of Consignment; Governing Law.** The Terms of Sale/Consignment 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 contract between the Seller and Customer. No modification, alteration, or amendment of the Terms of Sale/Consignment contained in any communication by the Customer in any medium shall be binding upon the Seller unless accepted in writing and signed by the Seller's authorized representative. The Terms of Sale/Consignment 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/Consignment.