



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.

**Collateral** has the same meaning as set out in the PPSA;

**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.

**Grantor** means the Purchaser and has the same meaning as set out in the PPSA.

**Guarantor** is the Person described in the Guarantee and Indemnity (as required);

**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, corporation, partnership, incorporated association, trust or any other legal entity which has ordered the supply of Products from the Seller.

**PPSA** means *Personal Property Securities Act 2009 (Cth)*;

**PPSR** means Personal Property and Securities Register;

**Secured Party** means the Seller, and means the same as set out in the PPSA;

**Secured Property** means the Goods and Services described in the Order, and has the same meaning as set out in the PPSA;

**Security Agreement** means this agreement, as varied from time to time by signed written agreement between the parties;

**Seller** means Vesuvius Australia Pty Ltd ABN 75 003 691 245.

**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.

**Supplier Property** means Products that the Purchaser has not paid for as required under this Contract whereby the Seller retains title to the Products;

**Supply** 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.vesuviusaustralia.com.au](http://www.vesuviusaustralia.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. Offer.** An Order is the offer of the Purchaser to buy Products from the Seller. Each Offer of the Purchaser is open for acceptance by the Seller. Each Offer 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, being the Terms of Sale. No variation to the Terms of Sale shall become part of the 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 the 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 made available by the Seller 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 are not included in the price and 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. Purchaser shall be responsible for all demurrage and shall be solely



**TERMS OF SALE OF PRODUCTS – AUSTRALIA**  
**Effective 1 March 2016**

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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 they have 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 unless the Seller's negligence can be clearly demonstrated at a later date.

**8. Product Warranties.** The Seller expressly warrants that all the Products Supplied conform to the Specifications, upon Delivery. All express and implied terms, 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. To the maximum extent permitted by law, the Purchaser accepts that the Seller is not liable for direct, indirect or consequential loss to the Purchaser or a third party in relation to the Supply of the Products, or the non-supply of the Products, and the operation or failure of the Products.

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, statutory guarantee that cannot be excluded under the Competition And Consumer Act 2010 Cth, the Australian Consumer Law, any similar State or Territory Legislation. 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 consequential or otherwise is excluded to the 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 Purchaser, or if any order shall be made or any resolution passed for the winding up, liquidation or dissolution of Purchaser, or if a receiver be appointed for it or its property, or if any of its 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 this Order, effective upon written notice to the Purchaser, provided that the Seller shall be responsible for Purchaser's actual out-of-pocket costs reasonably incurred in reliance on this Order until the date of such termination.

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

**12. 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 Purchaser to the Seller on a due date and such interest shall be calculated on a daily basis from the due date for payment.

**13. 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.

**14. 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.

**15. Personal, Property And Security Act**

- a) The Parties acknowledge and agree that this Contract and the Terms of Sale together form a Security Agreement for the purposes of the PPSA.
- b) The Parties acknowledge and agree that when the Seller provides the Purchaser with Products, and those Products are not fully paid for by the Purchaser, those Products are Secured Property, and the Grantor grants the Secured Party a Security Interest within the meaning of section 12 of the PPSA.
- c) The Parties acknowledge and agree that the Secured Property becomes the Collateral, and that the Security Interest attaches to the Collateral for the purposes of section 19 of the PPSA.
- d) The Parties acknowledge and agree that when the Seller leases goods to the Purchaser, this Contract is a PPS Lease within the meaning of section 13 of the PPSA, and the Purchaser agrees that when the Purchaser enters into possession of the Secured Property, a Security Interest attaches to the Secured Property, and the Secured Property is the Collateral within the meaning of section 19 of the PPSA.
- e) A Security Interest created by the operation of this clause 15 is a Purchase Money Security Interest ("PMSI") within the meaning of section 14 of the PPSA.
- f) The Purchaser irrevocably authorises the Seller to register its Security Interest on the Personal Properties & Securities Register ("PPSR"), and shall indemnify the Seller for the costs of registration.
- g) The Purchaser agrees to act in a manner consistent with and/or refrain from acting in a manner inconsistent with the Seller's rights to perfect and protect its Security Interest.
- h) The Purchaser agrees to provide the Seller with ten days written notice of a change, or proposed change, in the Purchaser's business details, including, but not limited to, changes of business names, registered business address/trading address, and the location of the Secured Property.
- i) The Purchaser acknowledges and agrees that the Seller will have the power to seize, retain, or dispose of the Collateral, in accordance with Chapter 4 of the PPSA, except in so far as: -
  - i) Section 95 does not apply to the extent that the Seller is required to give notice of an accession;
  - ii) Sections 96, 125, and 129 do not apply;



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- iii) Section 130 does not apply to the extent that the Seller is required to give notice of disposal of the Collateral;
- iv) Section 132(3)(d), 132(4), 135, 142 and 143 do not apply;
- v) Section 157 does not apply to the extent that the Purchaser is entitled to a Notice of Variation Statement.
- j) The Parties acknowledge and agree that the right, title and interest in the Products remains with the Seller until the Products are paid for in full.
- k) If any of the Products are sold by the Purchaser then such sale shall be as an agent for the Seller and Purchaser shall hold the proceeds of sale on behalf of the Seller and shall pay them to the Seller on request.
- l) 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 for any amount outstanding to the Seller in relation to the Products.
- m) If the Seller so requires, the Purchaser agrees to store the Products so as to show clearly that the Products are the Seller's property; 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 Purchaser's indebtedness to the Seller) in trust for the Seller.
- n) 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 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.

#### **16. Warranty**

- a. The Purchaser warrants that:
  - i) It has all necessary power and authority to accept these Terms of Sale; and
  - ii) That it will not breach any agreement with a third party by ordering any Products or by entering into this Contract; and
  - iii) That any person ordering Products on behalf of the Purchaser from time to time is authorised by the Purchaser to do so; and
  - iv) It holds all necessary licences and permits required to purchase Products from the Seller; and
  - v) It will supply any particulars relating to such licences and permits immediately upon request by the Seller.

#### **17. DISPOSAL OF BUSINESS**

- a. The Contract is not assignable by the Purchaser, and the Purchaser shall promptly notify the Seller in writing of:
  - i) Its intention to sell, transfer or assign its business (including the stock in trade of the business) at least fourteen (14) days prior to the date of completion of the sale, whereupon the Seller may request the purchaser, transferee or assignee to enter into an agreement to supply Products under its then current Terms of Sale;
  - ii) Any application for the appointment of a trustee in bankruptcy, receiver or liquidator or official manager of the Purchaser's company or business of the Purchaser; and
  - iii) Any circumstances likely to lead to the appointment of a trustee in bankruptcy, receiver, administrator, liquidator, or official manager of the Purchaser's company or the business of the Purchaser.

- b) In circumstances described in this clause, the Purchaser shall at the request of the Seller:
  - i) Separate all of the Products supplied hereunder but not paid for or, part paid for, from all other stock of the Purchaser; and
  - ii) Shall advise the purchaser, receiver, administrator, liquidator, or official manager, as the case may be, that the Products so separated is not the Purchaser's property but the property of the Seller; and
  - iii) Shall do all things necessary and procure that all things be done to give Seller access and deliver to the Seller or cause to be delivered to the Seller all such Products.

#### **18. TRUSTEE**

- a. The Purchaser agrees that if it trades with the Seller in its capacity as trustee of any trust (whether or not known by Seller) then the Seller shall be indemnified for any loss against the assets of that trust, which assets from time to time shall be charged by the trustee in favour of Seller, to secure the Seller's interests under this Contract.
- b. The assets of the trust shall be held on constructive trust for the Seller until such time as the Seller recovers all monies owing to it by the Purchaser pursuant to this Contract.

- 19. Privacy Information.** 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 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 Purchaser, credit information about Purchaser's commercial finances. Purchaser permits such institutions to provide such information to the Seller. In particular, Purchaser consents to the Seller obtaining and receiving such information for the purposes of approving any application of Purchaser for credit from the Seller. Purchaser 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 Purchaser at the last known address known to the Seller prior to disclosure.

The Purchaser acknowledges that it is aware of the Seller's Privacy Policy which is available on the Seller's website.

- 20. 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



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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.

**21. Patents.** 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.

**22. 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.

**23. Terms of Sale.** The provisions of the Terms of Sale applying in each case shall be those at the date of the Seller acceptance of an Order. The Customer acknowledges that the Terms of Sale may be different at different dates. By signing an acknowledgement of acceptance, agreeing to the Terms of Sale by email, or placing an Order with the Seller, the Customer assents to be bound by the latest edition of the Terms of Sale as published on the Website at the time of acceptance of an Order.

**24. 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 the Terms of Sale the Customer is expressly agreeing to check the Website regularly for changes in the Terms of Sale.

**25. 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 contract between the Seller and 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 the State of New South Wales, Australia.

## 26. DEFAULT

- a) The Purchaser is in default of this Contract if:
  - i) Breaches any of these terms and conditions and fails to remedy that breach; or
  - ii) Fails to pay to the Seller any moneys due to the Seller by the due date for payment; or

- iii) A trustee in bankruptcy, receiver, manager, liquidator, provisional liquidator, administrator or official manager is appointed over all or any part of the assets or undertaking of the Purchaser; or
- iv) Enters into or proposes to enter into a scheme of arrangement, or a petition is presented to declare the Purchaser bankrupt, wind up the Purchaser or the Purchaser is insolvent.

- b) If the Purchaser is in default under this Contract, the Seller may:
  - i) Demand payment of all money owing by the Purchaser to the Seller (in which case the Purchaser must forthwith make that payment); and/or
  - ii) Repossess any Products in which it has title; and/or
  - iii) Sell any Products which it has repossessed by public auction or private treaty, by retail or wholesale, for cash or on terms and in such manner as the Seller thinks fit, and apply the proceeds actually received towards repayment of any moneys owing by the Purchaser to the Seller; and/or
  - iv) Terminate the supply of Products and this Contract.
- c) The Purchaser's authority to deal in any way with the Products ceases upon the occurrence of any of the matters set out in this clause.
- d) Any failure by the Seller to exercise any right accruing to the Seller pursuant hereto or otherwise shall not constitute a waiver by Seller of that right.

## 27. CONFIDENTIALITY

- a) The Purchaser shall treat all information disclosed to it by the Seller as confidential and shall not use such information other than in accordance with the directions from time to time given by Seller either pursuant hereto or otherwise.
- b) The Purchaser acknowledges that it has no proprietary right or interest in any information or system disclosed to it by the Seller.
- c) This provision does not apply to information which was in the public domain prior to its disclosure by the Seller or which after such disclosure, enters the public domain through no act or omission by the Purchaser, or to information which the Purchaser is required to disclose by law or the rules of any stock exchange.

## 28. NOTICES

- a) Any notice given under these terms and conditions, shall be given in writing and delivered, mailed, faxed or transmitted by electronic mail to the respective parties at their designated address.
- b) The Purchaser's designated address is deemed to be the address set out in the Purchaser's Order or the Purchaser's registered office. Either party may change its designated address by prior notice in writing to the other.

## 29. GST –

Where a price quoted does not state whether it is GST inclusive or exclusive, the Purchaser agrees that it is GST exclusive, and that GST must be added to the final price.

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