

# KAURI NEW ZEALAND LIMITED –Standard Terms & Conditions of Sale (NZ Sep 02)

These terms shall be incorporated in to all agreements and invoices for the supply of goods by Kauri New Zealand Limited (together with its successors and assigns called "the seller") to any customer in New

Zealand (together with its successors called "the buyer") so as to prevail over and notwithstanding the terms and conditions of any order or other document submitted by the buyer.

## 1. Definitions in this document:

**"Buyer's order"** means an order for goods placed with the seller by or on behalf of the buyer in writing or verbally and whether or not in response to a quotation.

**"Claim"** includes any action in any court and any demand or claim: (a) for loss of profits; or (b) for any consequential, indirect or special loss, damage or injury of any kind suffered by any person arising directly or indirectly from: (i) any breach of the seller's obligations under this contract; or (ii) any cancellation of the contract; or (iii) any negligence, misrepresentation, or act or omission by the seller or its employees, agents or contractors; or (c) for any compensation, remedy or seller's liability.

**"Default"** or "the buyer's default" means:

(a) the buyer fails to comply with these terms or fails to make any payment on due date; or (b) the buyer causes or allows some of the goods to be destroyed, damaged, endangered, disassembled, removed or concealed from the seller; or (c) the buyer allows any lien to be created over the goods or creates another security interest in the goods or sells the goods other than in the ordinary course of business; or (d) the buyer allows any judgment against it to remain unsatisfied for more than seven days or suffers any distress against the goods; or (e) the buyer commits an act of bankruptcy or enters into any composition or arrangements with its creditors; or (f) if the buyer is a company the buyer does anything which would make it liable to be put into liquidation or if a resolution is passed or an application is made for the liquidation of the buyer or if a receiver or statutory or official manager is appointed over all or any of the buyer's assets; or (g) the buyer fails to collect any goods or take any delivery; or (h) the buyer ceases to carry on business or threatens to do so; or (i) the ownership or effective control of the buyer is changed or the nature of the buyer's business is materially altered; or (j) the seller's credit reporting agency is unable to provide a credit rating with respect to the buyer which meets the seller's requirements.

**"Future advances"** has the meaning contained in the Personal Property Securities Act 1999 (NZ) ("PPSA").

**"Goods"** means goods described in all invoices forwarded by the seller to the buyer.

**"Initial quotation"** means a written or verbal offer by the seller to sell the goods for the purchase price to the buyer.

**"Person"** includes any incorporated or unincorporated body, a trust, or a partnership.

**"Purchase price"** means the price of the goods charged by the seller to the buyer and the purchase price shall be subject to confirmation and to variation under the subsequent clauses of this agreement.

**"These terms"** means these terms and conditions of sale and any seller's amendments thereto and include the contents of any seller's invoice.

**Undefined expressions** shall have the meaning set out in the PPSA.

**"Variable"** includes the purchase price, method of delivery and delivery date or dates.

## 2. Offer & Acceptance

(a) Any initial quotation from the seller shall be subject to the seller's confirmation following receipt of the buyer's order.

(b) Placement of an order from the buyer shall constitute an irrevocable commitment to accept the goods and pay the purchase price notwithstanding any change in any variable between the date of the order and the time of submission of the seller's invoice. The seller may alter any variable. The contract may not be varied or cancelled by the buyer without the written consent of the seller, whether or not the seller has communicated a confirmation to the buyer.

(c) If the seller does not have possession of the goods ordered by the buyer at the time of receipt of the buyer's order, the seller's obligation to deliver the goods shall be subject to the seller being able to obtain such goods as are necessary to meet the buyer's order from a supplier and upon terms which are suitable (as assessed at the seller's discretion) to the seller.

(d) Prices quoted do not include GST or (unless otherwise stated in the initial quotation) any other tax or duty associated with the goods or their supply, and the buyer must pay these in addition to the price.

(e) The seller may alter prices as a result of any change in the cost of freight or transport, insurance, exchange rates or any import duty or other Government levy on the goods which occurs or is imposed after the date of the seller's confirmation to the buyer.

(f) If the buyer requests a fixed currency price and the seller in its quotation or confirmation states that the goods are supplied at such fixed currency price, the seller may notwithstanding adjust the fixed currency price to allow for any fluctuations in the exchange rate arising between the time the quotation or confirmation is provided and the time that the seller enters into a forward currency

contract. The buyer acknowledges that the seller may not enter into a forward currency contract until after receipt of the buyer's order and until after receipt of confirmation from the seller's supplier or suppliers of the cost to the seller of obtaining the goods or the constituents of the goods.

## 3. Delivery and Risk

(a) Delivery shall be made at the place shown in the initial quotation or in the seller's confirmation and if no place is indicated delivery shall be made at the seller's premises or to the same delivery address as previous deliveries have been made to. If delivery is to be made at the seller's premises, the risk shall fall on the buyer and the buyer shall be solely responsible in all respects for the goods from the time that the seller places the goods in a position where the buyer may collect them and notifies the buyer that the goods are available for collection. If the seller is to arrange freight on the buyer's behalf, risk shall fall on the buyer from the time that the seller places the goods with a carrier notwithstanding that the seller does not notify the buyer of the forwarding of the goods.

(b) The seller may deliver by instalments the goods which are the subject of any one order and each instalment shall be delivered under the same terms as the other instalments of that order and paid for in accordance with clause 4 of these terms. Failure to deliver or making defective or delayed delivery of one or more instalments shall not entitle the buyer to cancel the contract or to make any claim and the seller may suspend or cancel any delivery at will.

(c) If the seller agrees to deliver the goods at the premises of the buyer the risk in the goods shall pass from the seller to the buyer at the time of delivery or, if the seller is unable to deliver through no fault of the seller, at the time when the seller first attempts to deliver the goods.

(d) The trade terms such as (but not by way of limitation) "CIF", "CFR", "FOB", have the definitions set out in Incoterms 2000 (in this context where the seller uses the term C&F, this has the same meaning as CFR).

(e) The date or time stated for delivery is an approximation and is in no sense the essence of the contract. The seller shall not be liable to the buyer or to any other person for any delay in transport or delivery.

(f) If the buyer fails to uplift or accept goods by or on the delivery date specified or such later date as the seller provides or delivers the goods, the buyer shall pay any costs incurred by the seller (to take back the goods or to protect or preserve the goods or the interests of either party) as a result of such failure whether for storage or otherwise until such time as the buyer uplifts or accepts the goods. If the buyer fails to uplift or accept the goods the buyer shall still pay for them.

## 4. Payment

(a) Unless the seller has accepted a credit application from the buyer, the buyer must pay the purchase price shown on the seller's invoice and any other charges in cash, upon delivery and the seller is not obliged to deliver the goods until such payment has been received.

(b) Payment is deemed to have received from the date the seller obtains cleared funds into its bank account.

(c) If the seller has granted credit to the buyer the buyer will make payment to the sellers bank account 7 days after the date of the invoice unless alternative payment terms have been agreed by the seller in its quotation.

(d) Payment will be made in full per the invoice, without deduction, or legal or equitable set-off or counterclaim.

(e) If the buyer defaults in payment on the due date, all monies due to the seller shall immediately become due and payable and the seller shall be entitled to charge interest on such outstanding monies at 15% per annum from the date payment was due until the date payment is received.

(f) The seller may (at its absolute discretion and without prior notice) apply all or any part of any credit balance with the seller to offset any amount owing (whether or not due for payment) by the buyer to the seller.

(g) The buyer may not assign any credit balance which it may have with the seller or debt which the seller owes to the buyer.

## 5. Default

(a) On the buyer's default:

i. The seller may suspend or terminate all contracts for goods which have not been delivered in full.

ii. All amounts owing by the buyer, whether due for payment or not, will be immediately due and payable.

(b) The buyer will pay to the seller upon demand the cost of any legal fees charged to the seller in pursuit of any unpaid debt of the buyer and such fees may include additional fees or commissions charged by debt collecting firms and actual legal costs and disbursements

charged on a solicitor and client basis. If the seller sues the buyer service of any document will be deemed to be effected on the buyer if that document is left at the address shown as the buyer's business address or home address or registered address or address for service. Whether default has occurred or not, the buyer will also pay to the seller all costs and disbursements incurred by the seller in the protection or enforcement or the attempted protection or enforcement of the security interest created by this agreement or the priority or registration of that security interest. The buyer agrees that the costs and disbursements payable under this clause are contractual damages.

(c) On the buyer's default the seller may also (whether or not it has exercised any other right) appoint a person to be a receiver of all or any of the goods. In addition to and without limiting any other powers and authorities conferred on a receiver (whether under the Receiverships Act 1993 (NZ) or at law or otherwise) a receiver has power to do all things in relation to the goods as if the receiver has absolute ownership of the goods.

(d) If the seller exercises or fails to exercise or delays in exercising any right or remedy available to it, that shall not prejudice the seller's ability to exercise that right or any other right or remedy.

## 6. Cancellation

On cancellation of any contract the seller may dispose of any goods not yet delivered to the buyer and the buyer shall indemnify the seller for any loss incurred by the seller as a result of the disposal of the goods at below the purchase price. Such cancellation shall not release the buyer from any existing obligation to pay for goods delivered to the buyer.

## 7. Title and Security Interest

(a) The buyer grants to the seller a security interest in all the buyer's present and after-acquired property as security for payment for all of the goods and for any other amounts owing by the buyer to the seller from time to time and for the performance by the buyer of all the buyer's other obligations to the seller from time to time. For the avoidance of doubt this agreement applies to future advances.

(b) While the goods are security for the buyer's debt and obligations the buyer shall store them separately and clearly identify them as belonging to the seller and the seller authorises the buyer to use the goods or to sell them in the ordinary course of the buyer's business. However this authority is revoked from the time that the buyer defaults under this agreement or from the time that the seller notifies the buyer in writing that the authority is revoked. The buyer shall advise the seller immediately of any default or any action on the part of any third party (including any creditor of the buyer) affecting the seller's interest in the goods.

(c) The seller will have a security interest in the proceeds of the sale or other disposition of the goods and the buyer will keep such proceeds separate from any other money or property of the same nature belonging to the buyer or to other persons and will hold such proceeds in trust for the seller as trustee for the seller and if the buyer fails to do so the seller may maintain an action for the proceeds of disposition of any goods.

(d) The seller may appropriate amounts received from the buyer in any manner it determines, notwithstanding any purported appropriation by the customer.

(e) If any money remains owing to the seller or if the buyer is in default under this agreement the seller may enter the buyer's premises or the place where the goods are and seize the goods and dispose of them as the seller sees fit and to apply such proceeds towards the debt. The buyer hereby irrevocably authorises the seller or seller's agents to enter the premises of the buyer to locate and seize the goods. The seller shall not be liable to pay on any claim occasioned by the seizure or disposition nor be liable to the buyer nor to any person making a claim through the buyer.

(f) The buyer waives any right to receive a copy of the verification statement confirming registration of a financing statement relating to any security interest under this agreement.

(g) If the seller does not at any time have priority over all other secured parties in relation to any goods then for the purposes of dealing with those goods the parties contract out of section 109 of the PPSA to the extent that the restriction in the words "with priority over all other secured parties" in section 109(1) of the PPSA shall not apply to the seller.

## 8. Force Majeure

The seller shall not be liable for failure or delay in shipment or delivery due to strikes, lock-outs, fire, accident, embargoes, war, terrorism, shortage of freight space, raw material shortage, production or supplier difficulties or any other contingency whatsoever beyond the control of the seller and in the event of any such contingency, the seller shall incur no liability to the buyer or to any other person. Provided the seller ships or delivers the goods within a reasonable time after the cessation or removal of the contingency or of its effects the buyer shall be bound to accept the goods.

## 9. Warranties

(a) All warranties, conditions and representations express or implied are hereby expressly excluded except in circumstances whereby the seller is by

law unable to exclude or limit its liability. To the extent permitted by law the seller shall not be liable to the buyer or any other person whether in tort or contract to pay any claim arising out of any contract or its performance or non performance or for negligence of the company or of the buyer or for any claim against the buyer by any third party even if the seller has been advised of the possibility of such a claim. The buyer will indemnify the seller against claims by third parties.

(b) The buyer warrants that the goods are supplied to the buyer for business purposes and not for the purposes of domestic or residential consumption or use. If the buyer on-sells the goods in any form it shall be a term of the buyer's sale that the Consumer Guarantees Act 1993 shall not apply if the goods are being acquired by the purchaser from the buyer for business purposes.

(c) The buyer will indemnify the seller against any liability or costs incurred by the seller under the Consumer Guarantees Act 1993 as a result of any breach on the part of the buyer of the obligations contained in this agreement.

(d) The seller may provide advice or information by way of assistance or service to the buyer with respect to the goods or their application or use but the seller provides such advice and information in good faith only and without being liable for any inaccuracy or for any loss or damage suffered by the buyer or any other person as a result of relying on the advice or information.

(e) Any liability of the seller with respect to any contract or supply shall be limited to the purchase price of the goods supplied.

(f) In the event that the seller's supplier has provided a warranty with respect to the goods, the seller will endeavour to enforce such warranty against the seller's supplier and will hold the benefit of any such warranty in trust for the buyer but the seller shall not be required to make any claim through any Court or tribunal for the enforcement of such warranty.

## 10. Damaged and Defective Goods

(a) If any goods are delivered in a defective condition or in a condition which does not comply with agreed specification the seller may at its sole discretion replace the goods or credit the buyer with the purchase price of those goods.

(b) The buyer shall check goods immediately following delivery and shall notify the seller that any goods are defective or do not comply with specification or are damaged to an extent so as to make such goods unusable. Notification must include copies of the delivery documents signed by the buyer or the buyer's authorised agent and our carrier annotating any damage. If the buyer fails to make such notification to the seller within 7 days, the buyer shall be deemed to have waived its right to make any claim with respect to those goods. Such goods shall be kept intact and in suitable storage so as to keep the goods in satisfactory condition for inspection by an authorised agent of the seller and may not be used or resold until such inspection has been completed.

## 11. Privacy Act 1993

(a) The buyer authorises third parties to release personal information to the seller for purposes relating to its dealing with the seller including:

- assessing their credit worthiness,
- supplying the buyer with goods and/or services, including information and offers relating thereto,
- enforcing debts and other legal obligations owing to the seller.

(b) The buyer authorises the seller to obtain all information the seller reasonably requires from

any third person for the purposes in the last sub-clause, and authorises the seller to use the information obtained from the buyer and in support of the buyer's credit application (whether from the buyer or not) for those same purposes.

(c) All of the buyer's personal information will be held by the seller at their business premises where it can be inspected and corrected by the buyer.

## 12. Trade Marks and Intellectual Property

The buyer acknowledges that the seller owns the goodwill in their Trade Marks and other intellectual property in the products and their packaging and that the buyer may not modify or alter in any way the seller's Trade Marks or the product packaging or use any other intellectual property in connection with the products.

The buyer may make no representations or Warranties to other parties concerning the products of the seller.

## 13. Alteration of Terms

The seller may alter these terms and an alteration shall apply to the supply of any goods ordered by the buyer after the date of notification of the variation to the buyer.

## 14. Law Applicable

The law applicable to any contract between the parties shall be the Law of New Zealand and any claim arising out of such contract or for the supply of goods from the seller to buyer shall be instituted and conducted in the Courts of New Zealand.