

KAURI AUSTRALIA (a Limited Partnership) –Standard Terms & Conditions of Sale (Aug 12)

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

"**Attaches**" has the same meaning as given to that term in the PPSA;

"**buyer**" means and includes the buyer and any servant, agent, partner, contractor or employee of that person;

"**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.

"**Collateral**" has the same meaning as given to that term in the PPSA;

"**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.

"**Financing Statement**" has the same meaning as given to that term in the PPSA;

"**Financing Change Statement**" has the same meaning as given to that term in the PPSA;

"**Perfected**" has the same meaning as given to that term in the PPSA;

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

"**Government levy**" includes any customs fees, import duties and any other levy whether imposed by a national entity or by a territorial unit within a national entity.

"**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.

"**PPS Law**" means:

- i. the PPSA;
- ii. any regulation made pursuant to the PPSA; and
- iii. any amendment from time to time made to any other legislation or regulation as a consequence of a PPS Law referred to in paragraph (i) or (ii) of this definition;

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

"**Products**" means any Products supplied by the seller to the buyer;

"**Purchase Money Security Interest**" has the same meaning as given to that term in the PPSA.

"**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.

"**Registration Commencement Time**" has the same meaning as given to that term in the PPSA.

"**Security Interest**" means:

- i. any security for the payment of money or performance of obligations including a mortgage, charge, lien, pledge, trust or power, or title retention arrangement;
- ii. a security interest as defined in the PPSA; or
- iii. any document that grants or creates anything referred to in either paragraphs (i) or (ii) of this definition and any other thing which gives a creditor priority over any other creditor with respect to any asset or an interest in any asset.

"**seller**" includes all the seller's employees and agents;

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

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

"**Verification Statement**" has the same meaning as given to that term in the PPSA;

a reference to "**including**" means "including without limitation"; and any agreement, warranty, representation or obligation which binds or benefits 2 or more persons, binds or benefits those persons jointly and severally.

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 confirmation or quotation 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 confirmation or quotation 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 seller's 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 by any statute dealing with receiverships in the country where the goods are situated or at law or otherwise (but subject to such statute) 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. Retention of Title

Property in the Products will remain with the seller and will not pass to the buyer until such time when the buyer pays all monies owing to the seller by the buyer, on all accounts and under any contract (which payments are not to any extent subsequently claimed or clawed back by any person standing in the place of or representing the buyer).

8. Covenants

While the Products remain the property of the seller, the buyer agrees with the seller that:

- a) the buyer holds the Products as fiduciary bailee of the seller;
- b) the Products will be stored separately so that they are readily identifiable as the property of the seller;
- c) the buyer will not dispose of the Products except with the seller's prior written consent or in the ordinary course of the buyer's business;
- d) the buyer will hold all money received, relating to the sale of the seller's Products in a separate account on trust for the seller and will pay such monies immediately on request to the seller;
- e) the buyer will not cause the Products to lose their identifiable character or be intermingled with other goods, in any way, either by any process of its own or by a third party, except with the seller's prior written consent;
- f) the money received for the sale of any intermingled goods, which contain the Products of the seller, will be held in trust for the seller (to the maximum extent that such "trust" monies represent the total outstanding debt owed to the seller on all accounts by the

buyer (and will pay such monies immediately on request to the seller);

the buyer has no right or claim to any interest in the Products to secure any liquidated or unliquidated debt or obligation the seller owes to the buyer;

the buyer cannot claim any lien over the Products;

the buyer will not create any absolute or defeasible interest in the Products in relation to any third party, except with the seller's prior written consent;

pending payment in full for all amounts owed by the buyer to the seller on all accounts, the buyer:

- i. subject to clause 10, must not allow any person to have or acquire any Security Interest in the Products;
- ii. must insure the Products for their full insurable or replacement value (whichever is higher) with an insurer licensed or authorised to conduct the business of insurance in the place where the buyer carries on business;
- iii. must not remove, deface or obliterate any identifying mark or number on any of the Products; and
- iv. must not move the Products from the buyer's premises.

9. Seller's Rights

If the buyer fails to pay for any Products within the period of credit extended by the seller to the buyer:

- (a) The seller may recover possession of all Products (in which property has remained with the seller) at any site owned, possessed or controlled by the buyer and the buyer agrees that the seller has an irrevocable licence to do so without incurring any liability to the buyer or any person claiming through the buyer; and
- (b) if required, the buyer will assign to the seller any rights of the buyer to any outstanding money relating to the re-supply of the Products. The buyer irrevocably appoints the seller or its nominee as its attorney to sign all documents and do all things necessary to assign the debts to the seller under this clause 9, where the buyer has failed to do so within 7 days of receiving written notice to do so, and ratifies any acts the attorney lawfully does or causes to be done with respect to any such assignment of debts.

10. PPSA Further Assurances

(a) If the seller determines that a PPS Law applies, or will in the future apply, to any agreement that incorporates these Terms and Conditions of Sale (**Supply Agreement**) or the supply of any Products, then the buyer must promptly upon request from the seller:

- i. do anything (including obtaining consents, making amendments to the Supply Agreement or executing a new Supply Agreement) for the purposes of:
 - A. ensuring that any Security Interest created under, or provided for by, the Supply Agreement:
 - attaches to the collateral that is intended to be covered by that Security Interest;
 - is enforceable, perfected, maintained and otherwise effective; and
 - any Security Interest created under, or provided for by, the Supply Agreement has the priority contemplated by that Supply Agreement; or
 - B. enabling the seller, on and from the Registration Commencement Time, to prepare and register a financing statement or financing change statement; or
 - C. enabling the seller to exercise any of its powers in connection with any Security Interest created under, or provided by, the Supply Agreement; and
- ii. provide any information requested by the seller in connection with the Supply Agreement to enable it to exercise any of its powers or perform its obligations under the PPS Law.
- (b) Except if section 275(7) of the PPSA applies, each of the seller and the buyer agree not to disclose any information of the kind referred to in section 275(1) of the PPSA that is not publicly available.
- (c) Where the Goods supplied under the Supply Agreement are not used predominantly for personal, domestic or household purposes, the buyer agrees that, on and from the Registration Commencement Time:
 - i. The seller is under no obligation to dispose of or retain any secured property the seller seizes within a reasonable time under section 125 of the PPSA;
 - ii. following a default, the buyer has no rights to redeem the secured property under section 142 of the PPSA;
 - iii. the buyer has no rights to reinstate this document following a default under section 143 of the PPSA; and
 - iv. despite the buyer paying for particular Goods itemised in an invoice or order or otherwise in respect of moneys owing under or in connection with the Supply Agreement, any payments received by the Supplier from the

Customer shall be applied in the following order:

- A. first, to satisfy any obligations owed by the buyer to the seller which are unsecured, in the order in which the obligations were incurred;
 - B. second, to satisfy any obligations owed by the buyer to the seller that are secured but which are not secured by a Purchase Money Security Interest, in the order in which those obligations were incurred; and
 - C. third, to satisfy any obligations owed by the buyer to the seller that are secured by a Purchase Money Security Interest, in the order in which those obligations were incurred.
- (d) Where the Goods supplied under the Supply Agreement are not used predominantly for personal or domestic purposes, on and from the Registration Commencement Time, the buyer waives its rights to receive:
- i. a notice of the seller's proposal to remove PPSA personal property which has become an accession under section 95 of the PPSA;
 - ii. a notice of the seller's proposal to exercise its rights in accordance with land law under section 118(1)(b) of the PPSA;
 - iii. a notice of the seller's proposal to enforce a security interest in an account, chattel paper or negotiable instrument under section 121(4) of the PPSA;
 - iv. a notice of the seller's proposal to dispose of any PPSA personal property under section 130 of the PPSA;
 - v. a notice of the seller's proposal to retain PPSA personal property under section 135 of the PPSA;
 - vi. details of the amounts paid to other secured parties in a statement of account provided by the seller under section 132(3)(d) of the PPSA;
 - vii. a statement of account under section 132(4) of the PPSA; and
 - viii. a copy of, or notice of, any Verification Statement confirming registration of a Financing Statement or a Financing Change Statement relating to any Security Interest under, or provided for by, the Supply Agreement.
- (e) Anything that is required by the seller to be done under this clause 10 shall be done by the buyer at its own expense. The buyer agrees to reimburse the costs of the seller in connection with any action taken by the seller under or in connection with this clause 10.

11. 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.

12. 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 on 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 acquired by the buyer for business purposes namely the purposes of re-supply or of using them up or transforming them in trade or commerce in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land and not for the purposes of personal domestic or household consumption or use. If the buyer on-sells the goods in any form, to the extent allowed by the legislation it shall be a term of the buyer's sale that the *Competition and Consumer Act 2010* (Australia) or any other consumer protection legislation in the country of final use shall not apply if the goods are being acquired by the purchaser from the buyer for such business purposes or if the goods are not of a kind ordinarily acquired for personal domestic or household use or consumption.

(c) The buyer will indemnify the seller against any liability or costs incurred by the seller under the *Competition and Consumer Act 2010* (Australia) or any other consumer protection legislation of any country 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.

13. 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.

14. Privacy Act 1988 (Australia)

(a) The buyer authorises all persons to provide the seller information including "sensitive information" as the seller may at any time request about the signatory/ies and the buyer (including, where applicable) the buyer's proprietors and directors with respect to all or any of the purposes listed below or any directly related purposes.

- i) assessing their credit worthiness,
- ii) supplying the buyer with goods and/or services, including information and offers relating thereto,
- iii) enforcing debts and other legal obligations owing to the seller. Further, the seller may provide information about its dealings with the buyer and with any signatory to this agreement to any third party.

(b) The buyer authorises the seller to use the personal information provided by the buyer and in support of the buyers application for credit (whether in the buyer's application or otherwise) for the purposes listed in the last sub-clause

(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.

15. 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 will 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.

16. 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.

17. Law Applicable

(a) Subject to sub-clause (b) of this clause 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.

(b) If the seller finds it necessary to issue proceedings in any Court or tribunal for the enforcement of its rights in rem against the goods, the seller may elect to conduct such proceedings in the Courts of the country where the goods are located and in that event, at the option of the seller, the law of that country may apply.

18. Acceptance

Acceptance by the buyer of these Standard Terms and Conditions of Sale, as amended by the seller from time to time, may be by any one of the following ways:

- (a) by signing and returning a copy of these Standard Terms and Conditions of Sale;
- (b) by performing an act that is done with the intention of adopting or accepting these Standard Terms and Conditions of Sale, including but not limited to continuing to purchase goods; or
- (c) by oral acceptance.

Failure to accept these Standard Terms and Conditions of Sale within seven days of receipt by the buyer of these Standard Terms and Conditions of Sale may result in the immediate withdrawal of the seller's offer to supply goods or services.