

TERMS OF SALE – DAIKEN NEW ZEALAND LIMITED

The following Terms govern all Orders placed by the Buyer and will be incorporated into each contract entered into between the Buyer and Seller for the supply of Goods, together with any invoices issued by the Seller for those Goods.

1. PRICE AND ORDERS

- 1.1 The Buyer will place Orders with the Seller in accordance with the Seller's processes as advised to the Buyer from time to time. The Seller may, at its discretion, reject any Order.
- 1.2 The Buyer will pay to the Seller the Price for the Goods in accordance with clause 2. The Buyer's obligation to pay the Price will not be affected by any defect in, or damage to, the Goods.
- 1.3 The Price will be increased by the amount of any GST and other taxes and duties which may be applicable, except to the extent that such taxes or duties are expressly included in the Price.
- 1.4 The Seller may change the Price for the Goods at any time on giving prior notice to the Buyer. Any change to the Price will apply to all Goods delivered on or after the date specified by the Seller in the notice to the Buyer. If no date is specified in the notice, the change will be effective immediately for all Goods delivered after the date of notification, and whether or not an Order for the Goods had already been received and accepted prior to the change.
- 1.5 Where the Buyer receives notice of a Price increase which affects an existing Order, the Buyer may, within 5 business days cancel Orders or balances of Orders outstanding (but only to the extent they are affected by the Price increase) by giving the Seller written notice.
- 1.6 Notwithstanding clause 1.5 where the Goods are:
 - outside the Seller's standard range of Goods, or
 - manufactured specifically to the Buyer's specifications and/or other requirements,the Buyer must pay the Price for the Goods (including any change to the Price) and no Order in respect of such Goods may be cancelled without the prior written approval of the Seller and on such terms as the Seller agrees.
- 1.7 There is no obligation on the Seller to enquire as to the authority of any person placing an Order on behalf of the Buyer.

2. PAYMENT

- 2.1 Payment of the Price is to be made by such method as the Seller nominates from time to time and is due by the 20th of the month following the date of Delivery.
- 2.2 The Buyer may not withhold payment or make any set-off or deduction from any Amount Owing without the Seller's prior written consent.
- 2.3 The Seller may apply any payments received in reduction of the Amount Owing as the Seller thinks fit.
- 2.4 If the Buyer does not pay the Price by the due date, the Seller may charge a default penalty calculated at a rate per annum equal to 7% above the 30 day NZD bank bill rate at 10.45 on the due date, and calculated on a daily basis on the unpaid portion of the Price and any other monies owing by the Buyer from due date until payment in full, plus GST (and such rate shall be chargeable both before and after any judgment is obtained).

3. DELIVERY

- 3.1 Where the Goods are to be supplied "Free into the Buyer's Store", the Seller will deliver, or arrange delivery of, the Goods to the agreed destination on the delivery date advised to the Buyer and pay any storage, transportation and insurance costs incurred as a result up to the time of delivery.

- 3.2 Where the Goods are to be supplied “Ex-Works the Seller”, the Buyer will take delivery of the Goods as soon as the Goods are made available for collection at the Seller’s premises, as advised to the Buyer.
- 3.3 Where Goods are to be supplied “Free on Wharf”:
- the Seller is responsible for all expenses arising from the importation of the Goods, to the time that the Goods are available for collection by the Buyer, and the Seller agrees to provide all of the documentation necessary to enable the Buyer to take delivery of the Goods and remove them from the agreed location; and
 - the Buyer will take delivery of the Goods as soon as the Goods are made available for collection, as advised to the Buyer.
- 3.4 In the absence of any specific agreement, Goods are supplied “Ex-Works the Seller” and clause 3.2 will apply.
- 3.5 Any time advised for delivery is an estimate only. The Seller has the right to nominate a suitable time for loading the Goods onto a delivery vehicle, taking into account weather conditions and safety matters, and the Seller is not liable for any delay in delivery.
- 3.6 In all circumstances whatever the agreed method of delivery, the Buyer will be responsible at its own cost for unloading the Goods, or for arranging for a suitable means of unloading the Goods, from the relevant delivery vehicle. The Buyer will indemnify the Seller against any loss, liability, costs or expenses incurred by the Seller in unloading the Goods.
- 3.7 The Seller may deliver the Goods by instalments. Each instalment will be treated as a separate contract under these Terms.
- 3.8 The Buyer will indemnify the Seller against any loss, liability, costs or expenses incurred by the Seller if, after the time for Delivery of the Goods, the Seller subsequently arranges storage or transportation of, or insurance for, the Goods (whether due to any failure or refusal of the Buyer to take delivery or following agreement with the Buyer).

4. **RISK AND SECURITY**

- 4.1 Risk of any loss, damage or deterioration of or to the Goods passes to the Buyer on Delivery.
- 4.2 Ownership of the Goods remains with the Seller and does not pass to the Buyer until the Buyer pays in full the Amount Owing in respect of the Goods
- 4.3 While Ownership of the Goods remains with the Seller, the Seller authorises the Buyer in the ordinary course of its business to use the Goods and to sell the Goods for full consideration. Except as otherwise expressly permitted by these Terms, the Buyer must not otherwise sell, lease, dispose of, create a security interest in, mortgage or part with possession of the Goods or any interest in the Goods (or purport to attempt to do such a thing) or permit any lien over the Goods.
- 4.4 The authority referred to in clause 4.3
- may be revoked by the Seller at any time by the Seller notifying the Buyer, in such manner and at such time as the Seller shall determine in its sole discretion, that the authority is revoked; and
 - is, in any event, revoked automatically from the time an Event of Default occurs including without limitation if an administrator is appointed to the Buyer.
- 4.5 Where the authority conferred by clause 4.3 is revoked under clause 4.4:
- the Buyer authorises the Seller to use reasonable force to enter the premises where the Goods are stored and remove them;
 - the Seller shall exercise reasonable care in entering such premises and removing such Goods, but shall not be liable for trespass or any damage caused by the use of reasonable force;
 - the Buyer is released from the obligation to pay the Price for all Goods repossessed by the Seller but only to the extent any proceeds obtained by the Seller reselling the Goods

(less all costs incurred) exceeds the Price owing by the Buyer to the Seller for those same Goods;

- the Seller may resell any repossessed Goods and apply the proceeds of sale in reduction of the Amount Owing as the Seller thinks fit; and
 - the Buyer is liable for all costs associated with the exercise by the Seller of its rights under this clause and costs are payable to the Seller on demand.
- 4.6 The Seller may bring an action for the Amount Owing in respect of the Goods even where Ownership of the Goods has not passed to the Buyer.
- 4.7 The Buyer must insure and keep insured with a reputable insurance company all Goods in its possession or control from the time of Delivery of such Goods against risk of loss or damage by hazards normally insured against.
- 4.8 Until Ownership of the Goods passes to the Buyer under these Terms, the Buyer must:
- keep the Goods in a manner that they are separately identifiable; and
 - keep proper stock records and records of account with respect to the purchase, receipt, sale of, and other dealings with, the Goods; and
 - make those records and/or the Goods themselves available to the Seller for inspection (and, in the case of the records, copy them) at its reasonable request and upon any failure to do so (and without limiting the Seller's other rights and remedies), the Seller may enter, and use reasonable force to enter, the premises where the records and/or the Goods are kept for any such purpose; and
 - not do or allow anything to happen that might contribute to a deterioration in the value of the Goods or otherwise adversely affect the rights or interest of the Seller in the Goods under these Terms.
- 4.9 The Buyer agrees that the Seller shall have the right at any time to complete and register a mortgage over any interest in property owned by the Buyer to secure the Amount Owing and the Seller shall have the right at its discretion to place a caveat on any such property for the purposes of this clause and the Buyer irrevocably appoints the Seller as the attorney of the Buyer for the purpose of the Seller exercising its rights under this clause whilst any Amount Owing remains outstanding.
- 4.10 Where the PPSA applies to the Goods:
- the Buyer acknowledges that the Seller has a security interest under the PPSA in all the Goods supplied by the Seller under these Terms as security for payment of the Amount Owing (including, for the purposes of sections 71 and 72 of the PPSA, further advances) in respect of the Goods;
 - the Buyer acknowledges that it has received value from the Seller as at the date of first delivery of the Goods and has not agreed to postpone the time for attachment of the security interest granted to the Seller under these Terms nor to subordinate such security interest in favour of any person;
 - these Terms and each security interest created under these Terms is a continuing security, notwithstanding intermediate payments or anything else and is in addition to, and not to be merged in, any other security agreement, guarantee or other agreement (present or future) expressed or intended to be security for any amounts owing to the Seller in respect of Goods;
 - no security interest created under these Terms is discharged, nor are the Buyer's obligations affected by any amendment to, or the validity or enforceability of, or failure to enforce, these Terms, or anything else whatever that, but for this clause, may have discharged these Terms or affected the Buyer's obligations under these Terms, and the Seller is not liable to the Buyer in relation to any of these matters, even though the Buyer's rights in subrogation or otherwise may be prejudiced as a result;
 - the Buyer will, at its own cost, promptly provide all information and do all things that the Seller may require to ensure that the Seller has perfected security interests in respect of

the Goods under the PPSA or otherwise to secure to the Seller the full benefit of its intended rights under these Terms;

- the Buyer waives its rights under the PPSA to:
 - receive a copy of any verification statement;
 - receive a copy of any financing change statement; and

4.11 To the extent that Part 9 of the PPSA applies to these Terms and to the extent permitted by law, the Buyer waives its rights set out in Part 9 of the PPSA and, where the Seller has rights in addition to those in Part 9 of the PPSA, those rights continue to apply.

4.12 The Buyer must immediately notify the Seller if the Buyer is considering whether to appoint an Administrator or Liquidator to the Buyer and will not without the consent of the Seller appoint an Administrator or Liquidator.

4.13 The security Interest created by these Terms is not discharged nor the Buyer's obligations affected by the administration of the Buyer.

5. **WARRANTIES AND LIABILITY**

5.1 In the event of any Claim under these Terms at the Seller's discretion Goods may be repaired or replaced or the Price refunded. These are the sole remedies available to the Buyer for default by the Seller under these Terms. No claim may be made against the Seller for loss of profits, consequential or indirect damages or special loss.

5.2 Claims with respect to non-conforming or defective Goods will only be accepted if made to the Seller in writing within 14 days after Delivery, or such further period as the Seller may agree in writing, and the Seller has first been given the opportunity to inspect the Goods and agrees to their return.

5.3 To the extent permitted by law, the Seller expressly excludes liability for any Claim by the Buyer or any other person relating to or arising from the supply of the Goods which is not expressly accepted by the Seller in writing and the Buyer agrees to indemnify the Seller against any such Claim.

5.4 In any event, the Seller's liability arising out of any Claim or otherwise under these Terms will not exceed the Price of the Goods.

5.5 The only guarantees agreed to by the Seller are those confirmed by the Seller in writing.

5.6 In respect of any Goods supplied to a Buyer registered in New Zealand:

- Goods are acquired by the Buyer for business purposes and the Consumer Guarantees Act 1993 ("CG Act") does not apply;
- the Buyer agrees to indemnify the Seller against any liability or cost incurred by the Seller under the CG Act as a result of any breach by the Buyer of its obligations under the CG Act to any person; and
- nothing in these terms is intended to have the effect of contracting out of the provisions of the CG Act except to the extent permitted under that Act.

5.7 In respect of the supply of Goods to a Buyer registered in Australia:

- nothing in these Terms excludes, restricts, or modifies any condition warranty or liability which is implied by the Trade Practices Act 1974 (Cth) ("TP Act"), or other applicable laws where to do so is illegal or would render any provision of these Terms void; and
- the Seller's liability for breach of a condition or warranty implied by Division 2 of Part V of the TP Act (other than a condition or warranty implied by Section 69 of the TP Act) in relation to the supply of goods or services which are not of a kind ordinarily acquired for personal, domestic or household use or consumption, is limited, at the Seller's option to:
 - in the case of goods, the replacement, repair, or payment of the cost of the replacement or repair of the goods; and
 - in the case of services, supply of the services again, or payment of the cost of having the services supplied again.

6. **DEFAULT**

6.1 If any Event of Default occurs,

- the Seller may suspend or terminate these Terms;
- any Amount Owing will immediately become due and payable notwithstanding that the due date has not arisen; and/or
- to the extent permitted by law, each security interest created by these Terms will become immediately enforceable and the Buyer must return the Goods to the Seller promptly on request or the Seller may take possession of and sell the Goods and the Seller has all the rights of a natural person in relation to the Goods and all other rights conferred by law (including under Part 9 of the PPSA) in relation to the Goods.

6.2 The Seller is entitled to recover from the Buyer all costs that the Seller incurs in connection with the exercise, protection or enforcement of the Seller's rights under these Terms or conferred by law, in each case on demand and on a full indemnity basis (including solicitor client costs)..

6.3 Subject to any mandatory law, the Seller will not be liable:

- in respect of any loss or damage that results from the exercise, attempted exercise or non-exercise by the Seller of its rights under these Terms or conferred by law; or
- to account as a mortgagee in possession in respect of the Goods if it or any person on its behalf takes possession of the Goods.

7. **FORCE MAJEURE**

7.1 Without limiting the foregoing, neither the Seller nor the Buyer will be liable for any delay or failure in the performance of any obligation or the exercise of any right under these Terms or for any loss or damage (including indirect or consequential loss or damage) if such performance or exercise is prevented or hindered in whole or in part by reason of a Force Majeure Event. Nothing contained in this clause will excuse payment of any money due or which becomes due under these Terms.

7.2 The rights and obligations of either party which are affected by a Force Majeure Event will be suspended during the continuance of the Force Majeure Event, and either party claiming to be affected by the Force Majeure Event will give immediate notice to the other party containing full particulars of the Force Majeure Event. The party giving notice under this clause will take all reasonable steps to mitigate the effects of the Force Majeure Event and remove such Force Majeure Event provided that neither party will be required to remove any such Force Majeure Event if to do so would require it contrary to its judgement to settle a strike or labour dispute or otherwise submit to the demands of opposing parties.

7.3 If the Force Majeure Event prevents or hinders performance of these Terms for a continuous period of 180 days either party may, on not less than 14 days prior written notice to the other party, terminate these Terms.

8. **USE OF INFORMATION**

8.1 The Buyer agrees that the Seller may obtain information about the Buyer from the Buyer or any other person (including any Person related to the Seller and including any company within the wider group of companies of which the Seller forms part (the "Wider Seller Group") and any credit or debt collection agencies) in the course of the Seller's business, including credit assessment, debt collecting and direct marketing activities, and the Buyer consents to any person providing the Seller with such information.

8.2 The Buyer agrees that the Seller may use any information it has about the Buyer relating to the Buyer's creditworthiness and, subject to any confidentiality agreement between the Buyer and the Seller, give that information to any other person, including any credit or debt collection agency and other members of the Wider Seller Group for credit assessment and or, debt collection purposes. The Buyer agrees that any other information collected by the Seller about the Buyer is accessed or collected for the use of any member of the Wider Seller Group in the course of its business, including direct marketing activities. Under the Privacy Act 1993 (NZ) and the Privacy Act 1988 (Cth), the Buyer has rights of access to, and correction of, their personal information.

- 8.3 In the case of any Goods supplied to a Buyer registered in Australia, notwithstanding any of these Terms, where the Buyer is a natural person, the Buyer specifically agrees for the purposes of privacy legislation including the Privacy Act 1988 (Cth) to the Seller:
- being given a credit report on him or her for the purpose of assessing an application for credit or for the purpose of the collection of payments that are overdue under these Terms; and
 - disclosing to or obtaining from another credit provider a credit report or personal information derived from a credit report on him or her for the purpose of assessing or exchanging information relating to his or her creditworthiness, credit history or credit capacity.
 - The Seller advises the Buyer and the Buyer acknowledges that the Seller may disclose the information it acquires about the Buyer to a credit agency or other members of the Wider Seller Group.

9.1 MEDIATION

- 9.1 Either party may require any dispute arising which has not been resolved within 14 days to be referred to mediation. The mediator will be appointed by both parties or, where the parties cannot agree within 14 days, in the case of a dispute in New Zealand appointed by the chairperson or any other office holder of the New Zealand chapter of LEADR, and in the case of a dispute in Australia appointed by the Australian Commercial Disputes Centre. The mediator will conduct the mediation in accordance with the guidelines agreed between the parties or if the parties cannot agree within 14 days following appointment of the mediator, the guidelines set by the mediator. The costs and expenses of the mediator will be shared by the parties equally.

10 OTHER AGREEMENTS

- 10.1 If there is any inconsistency between these Terms and any Order submitted by the Buyer (whether in writing, verbally or otherwise) or any other arrangements between the parties, these Terms prevail unless otherwise agreed in writing by the parties, save that as between these Terms and any valid, binding and current written agreement signed by the Buyer and the Seller, such formal written agreement shall prevail to the extent of any inconsistency.

11 WAIVER

- 11.1 If the Seller exercises or fails to exercise or delays exercising any right or remedy available to it, this will not prejudice the Seller's rights in exercising that or any other right or remedy unless expressly specified in writing and signed by the Seller.

12 NO ASSIGNMENT

- 12.1 The Buyer must not transfer or assign its rights under these Terms to anyone else without the Seller's prior consent in writing. The Seller may assign or transfer any of its rights or obligations under these Terms without the Buyer's consent. Each assignee or transferee is to have the same rights against the Buyer under these Terms as if named as the Seller.
- 12.2 In the event of the sale of the Seller's business or a substantial portion thereof the Seller shall be entitled to novate these Terms to the purchaser upon giving notice to the Buyer, and the Buyer agrees to such novation.

13 ELECTRONIC MESSAGES

- 13.1 The Buyer agrees that the Seller may send electronic messages relating to its business, including promotional messages in respect of goods and services offered by the Seller, to the Buyer from time to time to the email addresses provided by the Buyer. If the Buyer no longer wishes to receive such messages it may notify the Seller in which event no promotional messages will be sent by the Seller by electronic means to the Buyer.

14 GOVERNING LAW

- 14.1 These Terms will be governed by the laws of New Zealand and the parties submit to the non-exclusive jurisdiction of the Courts of New Zealand.

15 WORDS USED IN THESE TERMS

- 15.1 “Amount Owing” means, at any time, all amounts owing by the Buyer to the Seller under these Terms, or if the context expressly provides in respect of specific Goods.
- 15.2 “Buyer” means the person purchasing the Goods from the Seller pursuant to these Terms, including that person’s successors and assigns.
- 15.3 “Claim” includes any claim:
- for loss of profits; or
 - for any loss, damage or injury of any kind, including consequential, indirect or special loss or damage, suffered by any person arising directly or indirectly from:
 - any breach of the Seller’s obligations under these Terms; or
 - any cancellation of these Terms; or
 - any negligence, misrepresentation or other act or omission by the Seller or its employees, agents or contractors; or
 - for any other compensation, demand, remedy, liability or action.
- 15.4 “Delivery “ means delivery of the Goods as determined pursuant to clause 3 of these Terms.
- 15.5 “Event of Default” means an event where:
- the Buyer fails to comply with these Terms; or
 - the Buyer commits an act of bankruptcy; or
 - the Buyer enters into any composition or arrangement with its creditors; or
 - if the Buyer is a company:
 - the Buyer does anything which would make it liable to be put into liquidation; or
 - a resolution is passed or an application is made for the liquidation of the Buyer; or
 - a receiver or statutory or official manager is appointed over all or any of the Buyer’s assets, or the Buyer, its board or shareholders is considering appointing an administrator or liquidator; or
 - the Buyer, its board, or shareholders is considering appointing an administrator or liquidator; or
 - an administrator is appointed to the Buyer;
 - anything analogous to or having similar effect to any of the other events above arises.
- 15.6 “Force Majeure Event” means any event or circumstance which is beyond the reasonable control of the affected party and which results in or causes the failure of that party to perform any of its obligations under these Terms.
- 15.7 “Goods” means all goods and associated services supplied to the Buyer by the Seller under these Terms now and at any time in the future including (but not limited to) medium density fibreboard (MDF) and other building and building related products together with all accessories and replacements that are at any time supplied or attached to the Goods and all of the Buyer’s present and future right, title and interest (legal and equitable) in, all documents of title relating to, and for the purposes of the PPSA all debtors and proceeds arising from the sale of the Goods.
- 15.8 “Order” means an order placed by the Buyer with the Seller for the purchase of Goods.
- 15.9 “Ownership” means the property in and legal and beneficial ownership of the Goods.
- 15.10 “Person” includes a corporation, association, firm, company, partnership or individual.
- 15.11 “Price” means the purchase price of the Goods as most recently specified by the Seller to the Buyer in writing or otherwise (or, if no such price has been specified, the Seller’s then-current market price for the Goods) and any taxes or duties payable under clause 1.3 and any other

costs payable by the Buyer under these terms (including, without limitation, costs relating to transportation, storage and insurance).

- 15.12 "PPSA" means the Personal Property Securities Act 1999. Terms defined in the PPSA will have the same meanings where used in these Terms unless the context otherwise requires
- 15.13 "Seller" means Daiken New Zealand Limited its successors and assigns.
- 15.14 "Terms" means these terms of sale and, as the context requires, each contract entered into between the Buyer and the Seller for the supply of Goods and each invoice issued by the Seller to the Buyer for Goods into which these terms of sale are incorporated.
- 15.15 References to legislation include as amended, re-enacted or substituted and any statutory instruments, regulations and orders issued under such legislation.
- 15.16 Whenever "include" or any form of that word is used, it must be construed as if it were followed by "(without being limited to)".