

## TERMS OF TRADE

The following terms of trade ("**these Conditions**") apply to and form part of any sale of Goods and/or Services by Design Cladding Systems Pty Ltd ("DCS") ACN 141 132 238 ABN 18 584 258 803 and the Customer.

These Conditions replace any previous terms and conditions.

### 1. Definitions and Interpretation

**1.1** Where the context permits, the following expressions will have the meanings given to them:

"Business Day"	means any day other than a Saturday, Sunday or a designated Public Holiday in Victoria;
"Customer"	means a party acquiring Goods or Services from DCS;
"Goods"	means the metal panelling supplied and/or installed by DCS and the clips manufactured by DCS which are designed to affix the metal panelling to walls.
"Intellectual Property Rights"	means all intellectual property rights, including all copyright, patents, trade marks, design rights, trade secrets, domain names, know how and other rights of a similar nature, whether registrable or not and whether registered or not, and any applications for registration or rights to make such an application;
"Order"	is a written order to purchase clearly identified Goods or Services (including quantity, specifications and other relevant matters) at a price specified in a Quotation signed by or on behalf of the Customer;
"PPSA"	means the <i>Personal Property Securities Act 2009</i> (Cth);
"Quotation"	is a quotation as to the price of specified Goods or Services given by DCS to the Customer; and
"Services"	means the installation of metal cladding systems.

### 2. Formation of Contract

- 2.1** Quotations issued by DCS will not constitute an offer to sell specified Goods or Services at a specified price, but rather will constitute an invitation to the Customer to make an offer to purchase the specified Goods or Services at the quoted price by placing an Order. A contract for the supply of Goods or Services by DCS to the Customer is formed when DCS accepts an Order.
- 2.2** These Conditions apply to and form part of every contract for the supply of Goods or Services by DCS to the Customer. Orders are only accepted upon and subject to these Conditions.
- 2.3** If the Customer proposes that amendments be made to these Conditions, it must submit the proposed amendments and associated reasons for the amendments to DCS for consideration. DCS shall respond to the Customer as soon as practicable after having considered the amendments in light of the work to be done, and advise whether the amendments will be accepted.
- 2.4** Any qualification, addition, variation or provision which conflicts with these Conditions which appears on the Customer's Order shall not form part of the contract between DCS and the Customer unless such change appears on the face of the order duly accepted by an authorised person of DCS or is otherwise confirmed by DCS in writing.

### 3. Payment

- 3.1** DCS will issue invoices for the amounts and at the times or stages specified in the Quote or, if not specified, upon delivery of the Goods or completion of the Services.
- 3.2** Any deposit must be paid before DCS commences supplying the Goods or Services. The other amounts owing on each invoice for Goods or Services provided by DCS to the Customer must be paid in full within **14 days** after the date the invoice is sent to the Customer.
- 3.3** Any tax (including GST) or other duty on the production, sale, shipment or supply of any Goods or Services sold by DCS now imposed or hereafter becoming effective shall be added to the price quoted and shall be paid by the Customer to DCS.
- 3.4** Delivery charges will be charged to the Customer by DCS unless otherwise agreed by DCS in writing.
- 3.5** If after acceptance of an Order and up until and including the date of supply there are increases in the costs incurred by DCS due to fluctuations in the cost of raw materials, labour, the Goods themselves, currency

exchange rates, duty rates, freight rates or any other factors beyond the control of DCS, DCS reserves the right to increase the prices to include allowance for such increased costs by notice in writing to the Customer, at which point the Customer has the right to terminate the contract.

#### **4. Delivery**

- 4.1** DCS shall arrange delivery of the Goods or Services to the location agreed by DCS and the Customer unless the Customer has arranged to collect the Goods or Services from DCS.
- 4.2** DCS will not be liable for any loss or damage which may be suffered by the Customer (including consequential loss or damage) arising out of a delay in the delivery of Goods or Services.
- 4.3** DCS reserves the right to deliver any one or more consignments as part delivery with each consignment to be paid for in accordance with these Conditions.
- 4.4** The Customer must notify DCS of any shortfall or damaged or defective Goods within 24 hours of delivery failing which the Customer will cease to have a claim for the damage, defects or short delivery.
- 4.5** If DCS determines (acting reasonably) that the delivery contained a shortfall or damaged or defective Goods then DCS will arrange for any missing, damaged or defective items to be dispatched to the Customer.
- 4.6** Risk for any loss or damage to the Goods from whatever cause shall be borne by the Customer from the time the Goods are dispatched, or collected by the Customer, from DCS's premises. The Customer will be responsible for and indemnifies DCS for loss or damage to the Goods from that time.

#### **5. Default**

- 5.1** The Customer is in default if:
  - (a) it breaches any of these Conditions and either the breach cannot be remedied or, if it can be remedied, the Customer fails to remedy it within 7 days after receiving written notice of the breach;
  - (b) it fails to make a payment to DCS by its due date;
  - (c) being a natural person it commits an act of bankruptcy;
  - (d) being a corporation it has an administrator, receiver, receiver and manager, provisional liquidator, liquidator or controller appointed over its assets; or
  - (e) it has any execution levied against its property.
- 5.2** In the event of a default under 5.1, DCS will be entitled, without the obligation to give any notice to the Customer, and in addition to any other rights, to:
  - (a) payment of interest on all overdue accounts at the rate of 2% per calendar month, calculated daily and capitalized monthly, for each day that the amount is overdue;
  - (b) the commission it may have to pay to any recovery agent arising from such default or in recovering overdue amounts;
  - (c) its actual legal costs on an indemnity basis incurred in relation to such default or in recovering overdue amounts or in otherwise seeking compliance with these Conditions;
  - (d) immediate payment for Goods or Services, the payment which would otherwise not have been then due and payable;
  - (e) disallow any discounts otherwise claimable by the Customer;
  - (f) terminate or suspend delivery and installation of the Order or any other order which is the subject of any other sale between DSC and the Customer; and
  - (g) treat the Customer's default as repudiation or this or any other existing contract for the purchase of Goods or Services and recover any unpaid sum plus the interest, recovery agent's, and legal costs referred to in (a), (b) and (c) above from the Customer by way of liquidated damages.
- 5.3** DCS is in default if:
  - (a) it breaches any of these Conditions and either the breach cannot be remedied or, if it can be remedied, fails to remedy it within 7 days after receiving written notice of the breach;
  - (b) being a natural person it commits an act of bankruptcy;
  - (c) being a corporation it has an administrator, receiver, receiver and manager, provisional liquidator, liquidator or controller appointed over its assets; or
  - (d) it has any execution levied against its property.
- 5.4** In the event of a default under 5.3 the Customer will be entitled, without the obligation to give any notice to DCS, and in addition to any other rights, to terminate any outstanding orders by written notice, provided that it must still pay for services provided or goods delivered prior to the termination.
- 5.5** If these conditions are terminated or expire for any reason, then, in addition and without prejudice to any other rights or remedies available:
  - (a) the parties are immediately released from their obligations under these Conditions except those obligations listed in clauses 5 (Default), 10 (Limitation of Liability and Indemnity), and 11 (Intellectual Property) and any other obligations that, by their nature, survive termination; and
  - (b) each party retains the claims it has against the other in respect of prior breaches of these Conditions.

#### **6. Returns, Replacement & Cancellation**

- 6.1** Goods will not be accepted for return for credit without the prior approval of DCS, which may be granted with or without conditions or withheld at its unfettered discretion.

- 6.2** Without limiting the previous subclause, DCS may impose an administrative charge or surcharge on any return and provide a refund in the form of a credit against future orders or may replace the Goods as it determines, solely at its discretion.
- 6.3** Non-standard or specially manufactured or labelled Goods are not returnable.:
- 6.4** DCS may in its absolute discretion require the Customer to pay any charge, levy or tax associated with the return of Goods including, but not limited to, freight costs.

## **7. Title and Property in Goods**

- 7.1** Title to and ownership of and property in the Goods shall pass to the Customer only upon DCS receiving payment in clear funds of the full purchase price and any freight charges, taxes and interest or other monies due and while the Goods remain the property of DCS the Customer holds them on trust for DCS and the Customer shall store or keep them in a manner which clearly identifies them as the property of DCS.
- 7.2** If the Customer defaults under these Conditions, all of the Customers rights, including the right to be paid any money, under any contract pursuant to which the Customer has hired, sold or otherwise provided the Goods or any part of them, whether separately or together with other things, to third parties are automatically assigned to DCS with effect from the date of the default, but only to the extent necessary to enable DCS to recover the amount owed to it by the Customer.
- 7.3** Until the Customer pays all amounts it owes to DCS:
- (a) the Customer must keep all Goods insured against theft, damage and destruction on behalf of DCS (and if the Customer fails to insure the Goods DCS may do so and invoice the Customer for the cost of insurance);
  - (b) DCS may enter premises where the Goods are stored to inspect them on reasonable notice; and
  - (c) the Customer acknowledges that it holds the Goods as a bailee on behalf of DCS.
- 7.4** The Customer may on-sell the Goods prior to payment in full of the purchase price as agent for DCS provided that the proceeds received from the on-sale are held on trust for DCS until payment in full of the purchase price and are not mixed with other funds of the Customer until the purchase price is paid to DCS. The Customer agrees to indemnify DCS on a full indemnity basis and hold DCS harmless from liability for any loss damage or cost arising from any inaccurate or incomplete representations to third parties.
- 7.5** If any Goods are used in a manufacturing process or mixed with other materials, the Customer must record the value of Goods so consumed in relation to each unit of finished product and upon sale of any unit of finished product immediately hold that amount on trust for and remit that amount from the proceeds of sale to DCS.
- 7.6** If the Customer does not pay for any Goods on the due date, DCS is irrevocably authorised by the Customer to enter the Customer's premises (or any premises under the control of the Customer or as agent of the Customer if the Goods are stored at other premises) and use reasonable force to take possession of the Goods without liability for the tort of trespass, negligence or payment of any compensation to the Customer or anyone claiming through the Customer whatsoever.
- 7.7** If any of the Goods are not paid for in full by the due date, the Customer must not allow any person to create, have or acquire any security interest in the Goods.
- 7.8** The Customer acknowledges that DCS holds a security interest capable of registration pursuant to the PPSA in all Goods (including all present and after-acquired Goods which have not been paid for) and in all present and after acquired personal property of the Customer to secure payment of the amount the Customer owes to DCS from time to time. The Customer further acknowledges that the security interest will continue until DCS gives a final release in respect of it.
- 7.9** The Customer acknowledges and agrees that DCS may take all necessary steps to register its security interest under the PPSA, and hereby irrevocably consents to DCS doing so. The Customer further undertakes to promptly provide any information or supply any documentation and do all such things as required by DCS to enable it to perfect its security interest in the Goods in accordance with the PPSA.
- 7.10** The Customer acknowledges that the Goods constitute commercial property and hereby waives its right to receive notification from DCS of the registration of the security interest pursuant to section 157(3) of the PPSA.

## **8. Fitness for Purpose**

- 8.1** The Customer acknowledges that it has made due inquiry and relies on its own skill and judgment when deciding whether the Goods or Services are fit for purpose.
- 8.2** It is the Customer's responsibility to satisfy itself that Goods or Services are of a description, quality and character suitable for the purpose for which they are purchased and, to the extent permitted by law, DCS shall not be liable in any way for any loss or damage (including direct, indirect or consequential) arising from the failure of the Customer to so satisfy itself.

## **9. Information and Warranties**

- 9.1** All samples, drawings, descriptive matter and specifications issued by DCS are issued or published for illustration only and do not form part of the Quotation or the Order unless specifically referred to therein.
- 9.2** DCS will not be liable for any losses or damage, either directly or indirectly incurred by the use of or in reliance upon the information provided therein or for any errors, omissions or inaccuracies in the information provided.
- 9.3** DCS, if applicable, assigns to the Customer any warranty received from the original manufacturer of the Goods so far as DCS is permitted to do so.

## **10. Limitation of Liability and Indemnity**

- 10.1** To the extent permitted by law, DCS excludes all statutory or implied conditions and warranties and any other liability DCS may have to the Customer (including liability for indirect or consequential loss) that may arise

under statute or at law including without limitation for breach of contract, in tort (including negligence) or under any other cause of action.

**10.2** To the extent permitted by law, DCS limits its liability which cannot be legally excluded under all statutory or implied conditions and warranties and any other liability it may have to the Customer (including liability for indirect or consequential loss) that may arise under statute or at law including without limitation for breach of contract, in tort (including negligence) or under any other cause of action, to whichever of the following DCS determines at its discretion:

- supplying equivalent Goods or Services again; or
- paying of the cost of acquiring equivalent Goods or Services again.

**10.3** The Customer must give DCS written notice of any claim it may have against DCS in connection with the Goods or Services DCS supplied to the Customer within 12 months of when DCS supplies them to the Customer failing which DCS will not be liable for that claim.

**10.4** The Customer indemnifies DCS against all reasonable costs (including legal costs), expenses, damages, accounts or other losses or liability, including those arising from any actions, suits, proceedings, claims or demands, made against or suffered by DCS, arising out of DCS supplying the Goods or Services in accordance with these Conditions or arising out of the Customer breaching any of the Customer's obligations (which includes any negligent act or omission by the Customer or its agents) under these Conditions.

## **11. Intellectual Property**

**11.1** Ownership of all Intellectual Property Rights (other than third party Intellectual Property Rights) associated with the Goods or Services and any related documentation provided to the Customer pursuant to the Order belongs to or will vest in DCS on creation.

**11.2** Nothing stated in these Conditions shall be construed as an implied or express transfer of the Intellectual Property Rights to the Customer or any other party.

**11.3** The Customer shall not use any of DCS's Intellectual Property Rights including copyright, trademarks, logos, know-how and any other type of intellectual property belonging to DCS without the prior written consent of DCS.

## **12. Force Majeure**

Without prejudice to any other provision hereof DCS will not be liable for any failure to fulfil any terms of any agreement or inability to supply any Goods or Services if such fulfilment is delayed, hindered or prevented by any circumstances not within DCS's direct control including without limiting the generality of the foregoing strikes or lock-outs, material shortages, DCS's suppliers' failure to supply, labour disputes, war, hostilities or the threat or apprehension thereof or compliance with any order or request of any competent government authority or department or court of law.

## **13. Interpretation**

**13.1** In the interpretation of these Conditions, unless specified to the contrary:

- (a) time is of the essence;
- (b) words importing the singular include the plural and vice versa;
- (c) words importing any gender include all other genders;
- (d) a reference to a natural person includes a company or other corporate body and vice versa;
- (e) a reference to any legislation, regulation, code or local law includes any modification, re-enactment or substitution of it;
- (f) the obligations on the part of a Customer who is a natural person includes his heirs, executors, administrators and assigns; and
- (g) the obligations on the part of a Customer which is a company or other corporate body includes its successors and assigns.

**13.2** Any obligation imposed by these Conditions on a Customer comprised of two or more persons (whether natural, corporate or a combination of the two) binds them jointly and each of them severally.

**13.3** The Customer may not, without the consent of DCS, raise a set off or counterclaim available to it against DCS in reduction of its liability under these Conditions;

**13.4** Clause headings are for ease of reference only and are not intended to affect the construction or interpretation of these Conditions.

**13.5** If the time for performing any obligation under these Conditions expires on a non-Business Day, then time is extended until the next Business Day.

**13.6** A waiver by DCS of a default by the Customer under these Conditions will not constitute a waiver of another or continued default of the same nature or any other provision of these Conditions.

**13.7** In the event that any or part of these Conditions is held to be unenforceable, the unenforceable part shall be severed and the remainder of these Conditions shall remain in full force and effect.

**13.8** These Conditions embody the entire agreement and understanding between the parties concerning its subject matter, and succeeds and cancels all other agreements, understandings and representations concerning the subject matter of these Conditions

**13.9** These Conditions can be varied by either party at any time, provided written notice of the variation is given to the other party and upon receiving written notice of the variation, it is given the opportunity to negotiate the proposed variation. Such variation will apply to all Orders and Quotations received after the date the proposed variation is agreed.

**13.10** These Conditions are to be governed by and construed in accordance with the laws of the State of Victoria and the parties submit to the exclusive jurisdiction of the state and federal courts located in Victoria.