

## DARKON PTY LTD TERMS AND CONDITIONS

These Terms and Conditions (**Terms**) apply to any Goods or services supplied or to be supplied to the customer, or any third person on the customer's behalf by Darkon Pty Ltd (ACN 123 822 533) (**Darkon**). The singular includes the plural and the converse. If the customer constitutes more than one person or entity, the Terms bind each of them jointly and severally.

### 1. Payment:

- (a) The granting of a customer credit account is subject to a prior credit assessment by Darkon following the customer completing Darkon's Credit Application form.
- (b) The granting or refusal of credit terms will be notified in writing to the customer by Darkon following Darkon's assessment of the customer's credit application.
- (c) If the customer is a customer to which credit terms have been granted, the customer must pay all invoiced amounts within 30 days EOM from the date of invoice.
- (d) Darkon accepts credit card payments however such payments will attract a 2% surcharge.
- (e) Darkon may allocate payments in any manner it chooses.
- (f) For cash only customers, the balance of any outstanding account is due and payable prior to release of Goods.
- (g) Customer payments shall be made to: Darkon Pty Ltd: BSB: 033 048 Account no: 298628. International Deposits use Swift code: WPACAU2S. Westpac Branch: 215 Smith Street, Fitzroy, VIC, 3065, AUSTRALIA. (quoting Darkon's Invoice Number).
- (h) The price of all Goods is exclusive of GST except where the price is expressed to be inclusive of GST.
- (i) The customer agrees to pay interest on any overdue amount calculated on a daily basis until paid in full at the rate prescribed by the *Penalty Interest Rates Act 1983* (Vic).

### 2. Risk:

Risk in any Goods passes to the customer on delivery.

### 3. Pricing & Progress Payments

- (a) Quoted prices will be subject to change if the customer changes the quantity of Goods ordered and /or if there are changes to the specification of the Goods and /or fluctuations in the price of labour, overhead costs, raw materials, and components between the time of Darkon's quote and the customer's order.
- (b) If the customer requests that Darkon delays the delivery of Product and Darkon accedes to such request in writing, Darkon reserves the right to amend the price of the Product to account for any changes in the price of labour, overhead costs, raw materials, and components experienced between the time of Darkon's quotation and the new agreed delivery date.
- (c) If after receipt of a purchase order issued by the customer, the customer fails to provide a delivery date for the Product or the delivery date of Product has been extended by the customer beyond Darkon's quoted delivery date or Darkon's Standard Delivery Time, Darkon reserves the right to invoice the customer and the customer agrees to pay 20% of the total value of the customer's purchase order at the expiration of every 3-month period, commencing on the date that Darkon receives the customer's purchase order and concluding when the total value of the customer's purchase order is paid in full.
- (d) If the customer requests that Darkon places its order on hold and Darkon accedes to such request, then the customer agrees that after a period of 5 working days from its request and in circumstances where the customer has not released the order for ongoing processing, the customer shall be liable to pay at that point, for all work and materials expended and committed to at that time. Furthermore, the customer shall then be liable to pay Darkon 20% of the total value of any purchase order at the expiration of every 3-month period, commencing on the date that Darkon accedes to the customer's request that the purchase order is to be put on hold, and concluding when the total value of the customer's purchase order is paid in full. A request by the customer to place manufacturing on hold and a subsequent agreement by Darkon to the request, to be effective, must be in writing.
- (e) The customer agrees to pay for so much of any forward order as is from time to time invoiced by Darkon.
- (f) Any customer requested amendment to purchase orders already placed will be assessed by Darkon and if Darkon accepts the amendment such will be acknowledged in writing to the customer by Darkon. Cancellations of orders for standard luminaire Products will incur a 30% cancellation / restocking fee. Cancellations or alterations to orders for profile Product will incur a 100% cancellation / restocking fee. Cancellations of orders for custom or non-standard Product will incur a 100% cancellation fee.
- (g) For Product which is purchased by Darkon and resold to the customer, (including but not limited to Dean Phillips, Heper, Lumascape, SR and other Product supplied and designated as a buy-in Product by Darkon in its quotation to the customer), the customer agrees to pay a 50% deposit at time of order with the balance payable in cash prior to delivery (for non-account customers), or if agreed by Darkon, the balance to be paid according to Darkon's standard terms of credit.
- (h) For standard luminaire Product where the value of the Customer's order is greater than \$300,000, the customer agrees to provide a deposit of 25% of the total contract value with the purchase order, with the balance payable cash prior to delivery (for non-account customers), or if agreed by Darkon, the balance to be paid according to Darkon's standard terms of credit.
- (i) For Darkon custom designed Product, for an order value of \$100,000 or less, the customer agrees to pay a deposit of 50% of the total order value with the purchase order, with the balance payable cash prior to delivery (for non-account customers), or if agreed by Darkon, the balance to be paid according to Darkon's standard terms of credit.
- (j) For Darkon custom designed Product, for an order value greater than \$100,000, the customer agrees to pay a deposit of 30% of the total order value with the purchase order and a further 30% of the total order value to be paid as a progress claim during the time of manufacture with the balance of 40% of the total order value payable in cash prior to delivery (for non-account customers), or if agreed by Darkon, the balance to be paid according to Darkon's standard terms of credit.

### 4. Orders and Delivery:

- (a) Darkon's Standard Delivery Time applies to all Darkon standard Product orders and to all Dean Phillips Product catalogue orders.
- (b) The delivery time for all custom designed Product will be provided to the customer on a project-by-project basis. The lead time commences upon receipt of a 50% deposit which is required for all custom Product orders and the customer's written approval of all final design drawings, (whichever is the later date).
- (c) Each order by a customer will constitute an offer only, by the customer to Darkon.
- (d) Delivery to the customer unless otherwise stated and agreed by Darkon, will be at Darkon's premises. If the customer has not collected Goods from Darkon after 14 days of any nominated delivery date, the customer must pay all storage costs.

- (e) Darkon reserves the right to refuse loading of a customer's vehicle where in the discretion of Darkon's dispatch personnel, the vehicle is unsafe to load, the vehicle is not suitable for road transportation and/or the load can't be properly positioned and secured.
- (f) Unless otherwise stated in Darkon's written quotation, all expenses relating to delivery, insurance, and transit or storage of Goods after delivery to the customer, will be at the customer's cost.
- (g) Darkon may in its absolute discretion unload Goods at any premises that the customer nominates for delivery. If the customer is not in attendance at any nominated premises, Darkon may leave any Goods and Darkon shall not be responsible for any claims, damages, costs, or expenses arising or resulting there from, including any claim that the Goods were not delivered.
- (h) Delivered Goods may not be returned unless defective or damaged in transit. Claims of defective or damaged Goods are subject to inspection at point of delivery by Darkon. Darkon will not accept liability for any damage caused by freight unless freight insurance has been agreed upon in writing by Darkon prior to the dispatch of the Goods.
- (i) Delivery will be organised and charged to the customer by Darkon on the following basis:
  - (1) Freight to the customer's premises or worksite is not included unless explicitly specified on the quotation;
  - (2) Delivery times quoted are estimates only. Darkon does not accept responsibility for any possible time delays in transit, unless otherwise agreed in writing. (Average domestic freight transit times are 2-5 working days and depend on product type, shipment size and shipping destination);
  - (3) That the delivery site has suitable all-weather access for safe entry, an appropriate turning circle and exit for conventional delivery vehicles, has appropriate traffic control and a suitable Goods delivery area;
  - (4) That Darkon is not responsible for unloading the Product;
  - (5) That the unloading of the delivery will be carried out promptly and efficiently and within 0.5 hours upon arrival at the nominated delivery address; and
  - (6) That the customer will indemnify Darkon for any additional delivery costs caused by any failure to comply with these terms and conditions.

## 5. Warranty and Liability

- (a) Darkon warrants to the customer that all Product will at the time of shipment conform with all contractual commitments, be free from defects, be of acceptable quality and will comply with all applicable Australian laws and regulations. Darkon further warrants that its Product is guaranteed for a minimum period of 5 years of normal operation which shall commence from the date of manufacture, (or if applicable, other such period as may be determined under the provisions of the Australian Consumer Law).
- (b) In the event of a failure of a Product, Darkon limits its liability and in its sole discretion to replacing the Goods or supplying equivalent Goods, or, in the case of services, by supplying the services again. The customer will rely entirely on its own knowledge, skill and judgment in selecting Goods which it orders from Darkon from time to time.
- (c) Under no circumstances will Darkon be liable for any liquidated damages, or any liability arising out of or in connection with any special, consequential, direct or indirect loss, cost or damage, harm or injury suffered or incurred by the customer as a result of the supply, faulty Product, late supply or non-supply of any Product. This includes any liability for a claim that the Goods are not fit for a particular purpose, except where the Goods are consumer Goods or services in which case Darkon's liability is limited as under clause 14.
- (d) Darkon will not be liable to replace or repair Product which has been tampered with, modified, disassembled, retrofitted, used outside its specified operating environment, or used in a manner otherwise than product of similar specifications would normally be used.
- (e) In the event of a warranty claim, the customer agrees to grant reasonable access during normal business hours to Darkon and/or its nominated agents or sub-contractors to the premises and/or area where the Products are installed for the purpose of assessing the customer's warranty claim.

## 6. Security Interests and Default Events

- (a) The customer gives Darkon a security interest in:
  - (1) all Goods Darkon supplies whether by way of sale or lease to the customer that are described in any invoice, delivery or shipping documents of Darkon's and/or order documents that the customer gives Darkon; and
  - (2) all present and future property of the customer including real property. The customer agrees that Darkon may lodge a caveat against any of its real property and agrees to give Darkon a mortgage in respect of the relevant property in registrable form if required by Darkon using memorandum of common provisions AA 3553 (or any successor to same). The security interest given by the customer is given as beneficial owner. If the customer is trustee of any trust, the customer acknowledges that the security interest given by it applies to the assets of the trust and its personal assets.
- (b) Any security interest arising secures the due and punctual payment of all moneys payable by the customer under the Terms. Any account arising by virtue of any sale of any Goods supplied to the customer takes effect as a transfer.
- (c) The customer irrevocably waives any rights to receive a copy of any verification statement related to Darkon's registration of its security interest on the PPSR.
- (d) The customer acknowledges that until it has paid for all Goods it is not the owner of those Goods and, as such, if chapter 4 of the PPSA applies to these Terms, then the customer contracts out of the enforcement provisions in s 115(1) except sections 120 and 121.
- (e) The customer irrevocably appoints Darkon as its attorney by way of security for the purposes of this clause and in respect of any enforcement powers including the appointment as Attorney for the customer as contemplated by Clause 7 (c).
- (f) Upon the occurrence of an Insolvency Event the customer irrevocably authorises Darkon and any of its lawful agents, at any reasonable time, to enter the customer's premises or any premises occupied by the customer or its agents and re-take any Goods and then to re-sell those Goods and retain the proceeds of the sale without prejudice to Darkon's rights to claim the balance of all moneys due. The customer indemnifies Darkon in respect of any such entry. The provisions of this clause survive the termination of any security agreement that arises in respect of these Terms.

## 7. Enforcement

- (a) If an event of Default occurs or is continuing, Darkon may immediately enforce these Terms. Without limitation, this includes:
  - (1) retaking possession of any Goods not paid for by the customer;
  - (2) suspending delivery of any Goods on order and/or refusing to process any unfulfilled order.
  - (3) enforcing any security interest.
  - (4) requiring payment of any proceeds held by the customer in a separate account or otherwise.
  - (5) appointing a receiver and manager of any of the customer's real or personal property. The customer agrees that any such receiver and manager has the powers conferred by the *Corporations Act 2001* (Cth).
- (b) The powers exercisable by Darkon are those given by these Terms including by statute, at law or in equity.
- (c) In the event that the customer has not been paid for the sale of Darkon's Goods by any of its own customers, at Darkon's option, Darkon may in addition to the powers in s 120 of the PPSA, collect that account on giving, to that customer, notice in writing to that effect. Darkon will be entitled to issue proceedings in the customer's name against its customer for recovery of that account for Darkon's benefit. For the purposes of this clause, the customer must keep proper records and accounts in respect of such unpaid

- sales, including the dates of sale, price, amount and identity of such customer and Darkon's Goods.
- (d) Darkon may in its discretion despite s 14(6) of the PPSA apply any moneys received in respect of any PMSI obligations of the customer on a pro rata basis.
  - (e) The customer will pay Darkon for its expenses, including mercantile agent's fees and any fees and commission paid to mercantile agents engaged by Darkon in relation to the actual or contemplated enforcement of the supply agreement including legal costs and expenses.

#### **8. Force Majeure**

Darkon is not liable for any delay or the failure to perform any obligation in the customer's favour arising as a result of any event beyond Darkon's control.

#### **9. General**

- (a) The customer will advise Darkon in writing, if it changes its name, its structure or officers or management, its registered office, become a trustee of any trust or if the constitution of any partnership of which it is a member changes.
- (b) If any provision of these Terms is unenforceable for any reason, it will not invalidate any other provision which will remain in full force and effect despite that invalidity.
- (c) These Terms contain the entire agreement in respect of the supply of Goods or services to the customer.
- (d) Darkon may at any time set off any amount Darkon owes the customer against any amount payable by the customer to Darkon.

#### **10. Governing law**

These Terms are governed by the laws of Victoria. The customer submits to the non-exclusive jurisdiction of any Victorian court and waives any rights to claim that courts there are an inconvenient forum.

#### **11. Notices**

- (a) Any notice required under these Terms may be given by any party, including any director or authorised person of that party.
- (b) Any notice may be given at that party's registered address or other address stipulated in any application in connection with these Terms or as notified in writing for the purposes of this clause. Without limitation, this includes any electronic address notified to the other party.

#### **12. Time**

For the purposes of any payment obligation under these Terms, time is of the essence.

#### **13. Survival of indemnities**

- (a) Each indemnity and payment obligation of the customer under these Terms is a continuing obligation, separate and independent from all other obligations, and survives termination of these Terms.
- (b) It is not necessary for Darkon to incur expense or make a payment before enforcing a right of indemnity.

#### **14. Exclusion of implied terms**

To the extent permitted by law, Darkon excludes all conditions, warranties, terms and consumer guarantees implied by law (including the Australian Consumer Law to the extent this legislation is applicable to the supply of Goods or services to the customer), arising in connection with a supply of Goods or services.

#### **15. Consent**

- (a) The customer agrees that Darkon may, subject to the Privacy Act, disclose commercial credit-related information of the customer, or in the case of a Company, of the proprietors of the customer, to credit reporting bodies for the purposes of assessing credit worthiness and providing the credit to the customer. The customer consents to the collection of commercial credit-related information about the customer, from credit reporting bodies and other sources in accordance with Darkon Privacy (Credit Information) Policy, located on its website.
- (b) The customer agrees that Darkon may use personal information other than commercial-credit related information for direct marketing in accordance with Darkon's Privacy Policy located on its website.

#### **16. Export of Goods purchased from Darkon**

- (a) The customer is responsible for obtaining, at its own cost, such import licences and other consents in relation to the Goods as are required from time to time, paying any costs, duty or excise associated with the export from Australia and the importation into the country of delivery and ensuring that the Goods comply with and are suitable for the country in which the Goods are to be used.
- (b) If requested, the customer shall provide such licences and consents to Darkon prior to the Goods being exported.
- (c) Darkon does not make any representation that the Goods are suitable for use in the importing country nor that the Goods are able to be exported from Australia.

#### **17. Electronic Communication**

The customer agrees that;

- (1) If a customer's signature or execution is required, the requirement is taken to have been met by an Electronic Communication; and
- (2) If Darkon is required to produce a document that is in the form of paper, the requirement is taken to have been met by an Electronic Communication.

#### **18. Dictionary**

**Default** means:

- (1) the customer fails to pay when due any moneys owing to Darkon under these Terms;
- (2) the customer gives any third party a security interest in accounts as original collateral in respect of the proceeds of any Goods supplied by Darkon;
- (3) an Insolvency Event occurs or is continuing;
- (4) the customer breaches any other provision of these Terms; or
- (5) upon any member of Darkon's Credit Team, posting by ordinary pre-paid post, emailing or faxing a letter advising that all money owing to Darkon is, despite any agreement to the contrary, immediately due and owing.

**Electronic Communication** means: a communication of information in the form of data, text or images by guided or unguided electromagnetic energy and includes a scanned image or any other form of digital storage.

**EOM** means: end of month.

**Goods** mean: any goods Darkon supplies to the customer whether on consignment or otherwise under these Terms. They include goods described on any invoice, quotation, work authorisation or any other forms Darkon provides the customer or any order the customer gives

Darkon.

**GST** means: any goods and services or similar tax, together with any related interest, penalties, fines or other charge.

**GST Law** means: A New Tax System (Goods and Services Tax) Act 1999 (Cth).

**Guarantor** means: that person, or entity, who agrees to be liable for the customer's debts whether on a principal debtor basis or who is otherwise a surety of the customer.

**Insolvency Event** means:

- (a) An administrator is appointed to the customer or any Guarantor.
- (b) Except for the purpose of a solvent reconstruction or amalgamation previously approved by Darkon:
  - (1) an application or an order is made, proceedings are commenced, a resolution is passed or proposed in a notice of meeting, an application to a court or other steps are taken for:
    - (i) the customer's winding up, dissolution or administration or of any Guarantor; or
    - (ii) the customer or any Guarantor entering into an arrangement, compromise or composition with or assignment for the benefit of creditors or a class of them; or
  - (2) the customer ceases, suspends or threatens to cease or suspend the conduct of all or a material part of its business or dispose of or threaten to dispose of a material part its assets.
- (c) the customer or any Guarantor is, or under legislation is presumed or taken to be, insolvent or ceases to carry on its business.
- (d) A receiver, receiver and manager, administrative receiver or similar officer is appointed in respect of the customer or any Guarantor.
- (e) Any distress, attachment, execution or other legal process is levied, enforced or sued out on or against all or any material part of the customer's assets or of any Guarantor and is not discharged or stayed within 14 business days.
- (f) A security interest becomes enforceable or is enforced.

**PPSA** means: the *Personal Property Securities Act 2009* (Cth).

**Product** means: goods provided by Darkon pursuant to a contract between Darkon and the customer.

**Standard Delivery Time** means: Unless otherwise stated in Darkon's quotation, for all Darkon standard Product orders 6 weeks lead time and for all Dean Phillips Product catalogue orders a 10-week lead time applies.

The expressions **account, financing statement, financing change statement, PPSR, proceeds, purchase money security interest (pmsi), security agreement, security interest, verification statement** have the meanings given by the PPSA. Without limitation, security interest bears its natural meaning and applies to all land and licences and personal property that is not personal property covered by the PPSA.

**Tax invoice, taxable supply** and **value** have the meaning given to them by the GST Law.