



## **TERMS AND CONDITIONS OF SUPPLY**

### **1. APPLICATION OF THESE TERMS**

- 1.1 These Terms apply to the supply of all Products by us to you.
- 1.2 These Terms supersede and exclude all discussions, representations, terms and/or conditions of trade, and all written or oral agreements, arrangements and understandings between us and you and any other terms and conditions which you seek to extend to the supply of Products by us to you unless you have an existing written agreement, arrangement or understanding with us in relation to the supply of Products, in which case that existing agreement, arrangement or understanding prevails over these Terms, unless we agree otherwise in writing.
- 1.3 We may amend these Terms at any time by notice to you and the amended terms will apply in respect of all Requests for Supply after you receive that notice.

### **2. QUOTATIONS AND REQUESTS FOR SUPPLY**

- 2.1 We may amend or withdraw price lists or quotations at any time. All price lists and quotations are subject to these Terms. If the price list or quotation is given without specifying a period within which you are to make a Request for Supply, then:
  - (a) in the case of a price list, the price list is automatically superseded when we publish a new price list; and
  - (b) in the case of a quotation, the quotation lapses 5 business days after we send the quotation to you, without the need for us to inform you of that.
- 2.2 Notwithstanding the foregoing, we may in our discretion accept a Request for Supply from you which has been placed after the relevant price list or quotation has been superseded or has lapsed.
- 2.3 Neither these Terms, nor any price list or quotation given by us, constitute an offer (capable of acceptance) or an agreement by us to supply the Products to you. Each Request for Supply placed by you is an offer to purchase the relevant Products subject to these Terms. We may in our discretion accept or reject any Request for Supply made by you.

### **3. CONTRACT CONFIRMATION**

- 3.1 An agreement for the sale of Products on these Terms will be formed once we confirm our agreement to sell you those Products by issuing a Contract Confirmation to you or, in the absence of a written Contract Confirmation, by Delivery of the relevant Products to you. You agree that the relevant written Contract Confirmation or, in the absence of a written Contract Confirmation, Delivery, will be evidence of the details of your Request for Supply.
- 3.2 Once an agreement for the sale of Products has been formed under clause 3.1, we are entitled to invoice you for all of the relevant Products in accordance with clause 11, irrespective of whether you subsequently submit shipping/delivery requests, purchase orders or similar requests in respect of those Products

3.3 After discussion with you, we may from time to time enter into agreements with third parties under which those third parties will Supply part or all of the Products referred to in a Contract Confirmation. In such circumstances, the Products Supplied under these Terms may not have been manufactured in New Zealand and/or by us.

3.4 Unless otherwise agreed in writing, reference to weights, quantities or other measures in relation to Product packaging are references to that weight, quantity or other measure within a variance of plus or minus 1%.

#### **4. PRODUCT SHIPMENT**

4.1 Subject to the remainder of this clause 4 and clauses 8.12 and 11.16, we will Supply Products to you in accordance with these Terms and:

(a) where we have agreed a Shipment Schedule, in accordance with the Shipment Schedule and so that the relevant Products are Supplied no later than 30 days after each specified Shipment date (and no earlier than 20 days before such date); or

(b) in the absence of any agreed Shipment Schedule, so that all Products have been Supplied no later than 30 days after the expiry of the Expected Shipment Period specified in the Contract Confirmation. We will use reasonable endeavours to Supply the Products to you at an even rate across the Expected Shipment Period.

4.2 Without limiting clause 11.16, if we are not able for any reason to Supply a Product referenced in the Contract Confirmation, we may, at our option:

(a) Offer to Supply you a substitute product having specifications which are not materially lower than the Specifications of the Product referenced in the Contract Confirmation; or

(b) offer to Supply you with an alternative product.

If you do not agree to us Supplying you with a substitute or alternative Product offered under this clause, we may cancel the relevant Shipment without liability.

4.3 Where the Products are to be Supplied by part or multiple Shipments, any failure by us to make any one or more of the Shipments or any claim by you in respect of any one or more Shipments will not affect our rights in respect of any Products already Supplied or that remain to be Supplied under a Contract Confirmation.

4.4 Unless the Incoterms Basis which applies to a Contract Confirmation provides otherwise, you shall be solely responsible for meeting (at your sole cost) all import and other regulatory costs and requirements (including those relating to consumer product safety) relating to the Products in a Shipment in the relevant territory or territories.

4.5 You should check all volumes Supplied against the Shipment documentation and lodge a claim with us within 30 days of being entitled to access the Products (whether you inspect them or not), otherwise you are deemed to accept that volume as correct on Delivery of the relevant Products.

4.6 We will round the quantity of Products in a Shipment up or down as necessary to ensure you receive full container loads of the relevant Products (or other applicable load unit), and the amount which you are required to pay for such Products as specified in the Contract Confirmation and/or Shipment Schedule for the relevant Products will be proportionately increased or decreased. Delivery of such a rounded quantity of Products over or under the amount of a Shipment will be deemed to constitute Delivery in respect of that Shipment.

- 4.7 If Shipment pursuant to your Contract Confirmation and/or Shipment Schedule becomes commercially impractical for us or our suppliers (in our reasonable opinion) then we may, after obtaining your agreement Supply the Products to a commercially reasonable substitute location or using a commercially reasonable substitute method of supply. In no circumstances will we Supply on a consignment or similar basis. If you do not agree to us Supplying you with Products to a commercially reasonable alternative location, or by commercially reasonable alternate means, we may cancel the relevant Shipment without liability
- 4.8 Where we are unable to Supply in accordance with the timeframes set out in clause 4.1 (or any other applicable provision of these Terms) as a result of your acts or omissions, or if you are unable to accept a Shipment as, how, and where advised in your Contract Confirmation or Shipment Schedule or as otherwise scheduled or arranged by us for any reason (including where you decline to accept all or any part of the Shipment or delay in doing so), we may cancel the applicable Shipment or any part thereof, or any remaining Shipments under a Contract Confirmation without resulting liability, and resell or resupply the Products to a third party, and you will be liable for any loss incurred by us on that resale or resupply, as well as any storage, transport and other logistics costs and any other costs incurred by us. We may also charge you an additional business administration fee per Shipment affected and an additional warehouse administration fee per full or part container load (the amount of which will be reasonably determined by us). If any of the Products perish, become damaged or tainted, or are otherwise unsaleable (“**Damaged**”) as a direct or indirect result of any such delay, or you being unable to accept a Shipment, you indemnify us for all costs and expenses incurred by us in connection with the Damaged Products (including arranging for transport and/or disposal). Products for the purposes of this clause 4.8 includes any of your other property which we have consolidated with, or delivered in conjunction with, the relevant Shipment at your request.
- 4.9 If we supply products to you which do not form part of a Shipment or the Contract Confirmation, you will:
- (a) hold those products for us as bailee;
  - (b) store those products appropriately and safely, and do your utmost to ensure those products are kept at the appropriate core storage temperature (and, if necessary, seek instructions from us as to the appropriate storage requirements and core storage temperature for the relevant products); and
  - (c) return those products to us or otherwise dispose of or deal with those products, in accordance with our advice and at our cost.

## **5. DEFECTS AND ACCEPTANCE**

- 5.1 You should inspect all Products Supplied and:
- (a) notify us immediately upon being entitled to access the Products (whether you inspect them or not) of any claimed defects in any of the Products, or any other dispute in relation to the quality of the Products, which are, or ought reasonably to have been, apparent at that time, and lodge a claim with us within 30 days of such access to the Products; and
  - (b) notify us as soon as you become aware of any claimed defects in any of the Products, or any other dispute in relation to the Products, which becomes, or ought reasonably to have become, apparent at any time after you are entitled to access the Product but prior to the expiry date of the relevant Products, and lodge a claim with us within 30 days of becoming so aware.

- 5.2 If you believe that any Product is defective due to conduct for which we are responsible, you must keep the relevant Products stored separately from all others and in the state or condition in which they were Supplied to you until we have an opportunity to inspect them. You agree to provide all assistance that we reasonably request to assess your claim and, if we accept that we are responsible for defective Products then you will either destroy the Products or deliver them up to (or as directed by) us on our request. Clause 10.5 then applies in respect of the relevant Products.
- 5.3 You acknowledge and agree that the burden of proof in respect of alleged defects in Products (or their packaging, storage or Supply), or in relation to the quality of the Products, rests with you.
- 5.4 You agree that we are not liable for any defect in or damage to Products or their packaging or storage, or in relation to any other dispute in respect of the Products (and those Products will be deemed to have been Delivered and Supplied by us and accepted by you in compliance with these Terms):
- (a) if you do not advise us of that issue within the time periods provided in these Terms, and include in your notice full details of the Products, the alleged defect or damage and all documents associated with the relevant Shipment, or if you fail to comply with clause 5.2;
  - (b) to the extent you have done anything that could have caused or contributed to the claimed defect;
  - (c) if you settle or compromise a claim by a third party concerning such Products without our involvement and prior written consent;
  - (d) subject to the Incoterms Basis, occurring whilst in transit with a third party (whether or not a common carrier) even if we arranged for that third party to transport the Products and Delivery or Supply has not occurred;
  - (e) if you do not reasonably assist us with our enquiries concerning your claim;
  - (f) if the Products have not been stored, cared for or used in a proper manner, including if the Products have not been properly stored by you at the appropriate core storage temperature;
  - (g) if the Products are incorporated into, mixed with or affixed to any other products, or used in any process; or
  - (h) which arises after the expiry date of the relevant Products.
- 5.5 You need to co-operate with us in relation to any recalls or withdrawals from sale of Products for any reason (including, at our cost, if we Deliver a defective Product) with the objective being to optimise your and our reputation and goodwill whilst ensuring public health and safety is maintained at all times.

## **6. RISK AND TITLE**

- 6.1 Unless otherwise agreed by us in writing, risk in all Products passes to you on Delivery even though title may not. You are solely responsible for the storage, insurance and application of Products at and after Delivery.
- 6.2 Title in all Products remains with us until such time as full payment is made in clear funds for all amounts owing by you to us for all Products invoiced and/or Supplied by us (together with any interest under these Terms) from time to time. Until such time as title in the

Products passes to you, we are entitled to require you at any time to immediately deliver up the Products to us (or as we direct).

- 6.3 You acknowledge that until such time as title in the Products passes to you, you:
- (a) must keep the Products stored separately from all other goods and keep the Products insured for their replacement cost and
  - (b) must not pledge or in any way charge or encumber the Products by way of security for the indebtedness of you or any other person.
- 6.4 Notwithstanding clauses 6.2 and 6.3 above:
- (a) You may sell, in the ordinary course of your business, any Products that are comprised in your inventory and that have been incorporated into the products you manufacture. However, any proceeds from such sale, or asset comprising an amount payable to you by a purchaser in respect of that sale, are held by you as a fiduciary and on trust for us to the extent their value does not exceed the amount you owe us under these Terms.
  - (b) You hereby grant us a security interest in each and every part of the Products (and any proceeds thereof) for any amounts owing by you to us from time to time, and for the performance by you of all your other obligations to us from time to time. To protect our security interest, you agree to allow us to register or otherwise perfect our security interest as permitted by law in any relevant jurisdiction should we so wish. On our request, you agree to promptly give us all assistance and information (including signing any documents) as we request to enable us to register or otherwise perfect our security interest with the priority we require.

## **7. PRICE AND TAXES**

- 7.1 All supplies of Product are on the Incoterms Basis.
- 7.2 Unless otherwise specified, the total amount payable for the Products purchased pursuant to each Shipment will be the aggregate of:
- (a) the price for the Products, as set out in the Contract Confirmation and/or Shipment Schedule for that Shipment (being the price payable by you for Supply of the Products on the relevant Incoterms Basis), as increased or decreased pursuant to clause 4.6 ; plus
  - (b) any additional amounts for any incidental services which you have requested from us, as set out in your Contract Confirmation and/or Shipment Schedule.
- 7.3 Unless otherwise specified by us or included within the Incoterms Basis:
- (a) any reference to an amount payable or consideration to be provided in respect of a Shipment to be made by us that is governed by or otherwise connected with these Terms is a reference to that amount or consideration excluding applicable Sales Tax and Duty; and
  - (b) the amount to be paid or other consideration to be provided to us in respect of any Supply (including any Supply that is a supply for the purposes of Goods and Services Tax Act 1985) that is governed by or otherwise connected with these Terms must be increased by an amount equal to any Sales Tax and Duty that we are or will become liable to pay in respect of that Supply so that we retain, after

payment of Sales Tax and Duty, the amount which we would have been entitled to receive but for our obligations to pay Sales Tax and Duty.

7.4 The Sales Tax and Duty will be due and payable by you on the date the payment in relation to which the Sales Tax and Duty is levied is due and payable under these Terms.

## **8. INVOICING AND PAYMENT**

8.1 Where specific credit terms have been agreed with you, this clause 8 will apply to you only to the extent that matters are not covered by those agreed terms.

8.2 Where payment for Products is to be:

- (a) by letter(s) of credit ("**L/C**"), you must arrange for the L/C to be issued in favour of us in a form, content and from an issuing bank that are all acceptable to us in our absolute discretion;
- (b) by documentary collection, documents will be tendered against payment ("**D/P**") subject to the ICC Uniform Rules for Collections which are in force from time to time; and
- (c) supported by a bank guarantee or standby L/C, you must provide a first demand bank guarantee or standby L/C in a form and content and from an issuing bank that are all acceptable to us in our absolute discretion.

A deposit may also be required by us. Any payments made pursuant to the methods under this clause 8.2 shall be made net of any bank charges and must equate to the amount invoiced for the applicable Products.

8.3 Unless we otherwise specify in writing, we must receive any advance payment, L/C, bank guarantee, standby L/C or deposit before we will commence processing a Shipment. Notwithstanding the previous sentence, where we have agreed in writing that you will pay for Products based on the bill of lading date for those Products, we must receive payment by that agreed date. We may, without prejudice to our other rights, refuse to commence Supply of any Products unless you have duly complied with the relevant requirements.

8.4 Where we have not extended credit to you in writing, we will provide an invoice for the relevant price and fees applicable to each Shipment.

8.5 Payment of all invoices must be received on the earlier of the specified due date or within 14 days of invoice in full without deduction (except to the extent required by law), set-off or counterclaim. If you are required by law to make any deduction or withholding on account of tax from any sum payable to us under these Terms, then the sum so payable will be increased by you to the extent necessary to ensure that, after the making of such deduction or withholding, we receive and retain (free of any liability in respect of any such deduction, withholding or payment) a net sum equal to the sum that we would have received and so retained had no such deduction or withholding been made.

8.6 You must give us written notice within 7 days of receiving our invoice if you believe that the invoice is not correct. Your notice must include full details of the error(s) claimed by you. If you have not given us valid notice of the error(s) within 7 days of receiving our invoice, you must treat our invoice as correct. You must make payment of the undisputed amount due on any disputed invoice on the due date. If an invoice is not disputed and remains unpaid after the due date for payment, or if an invoice is disputed but the undisputed part of that invoice is not paid by the due date for payment, we can withhold or defer any future Shipment pending payment, or part-Supply having regard to the paid component. Once the dispute is resolved, you must pay to us within 14 days the resolved amount due.

- 8.7 Where we agree in writing, you may direct that one of your Related Companies pays for Products under these Terms on your behalf, in which case we will seek payment from that Related Company, and this clause 8 will apply to that Related Company as well as to you. However, this clause 8.7 does not relieve you of any of your obligations under these Terms, and, without limiting our other rights under these Terms, if your Related Company fails to make any payment in accordance with these Terms, you will promptly make such payment.
- 8.8 If for any reason we do not obtain payment in full (whether under L/C or D/P or otherwise) you remain liable to pay us the total amount payable for the Products under these Terms and all related charges (including our costs of recovering any amount due).
- 8.9 Without in any way limiting our other rights:
- (a) we may charge a penalty interest calculated in accordance with the Fonterra penalty rate as notified to you from time to time (or, if less, the maximum amount permitted by law) on overdue accounts. Interest will accrue daily and compound monthly from the due date until payment has been received by us in cleared funds. Payments by you will be applied first to interest accrued and then to the overdue amount; and
  - (b) any collection charges, legal expenses (calculated on a full indemnity basis) and commissions or any other expenses incurred by us in attempting to recover from you any payment due to us are payable by you to us on demand by us.
- 8.10 If you owe us money for any reason and we owe you money in connection with these Terms, we may set off the amount you owe us against the amount that we owe.
- 8.11 We may, at any time, review any grant of credit to you and suspend or cancel such credit or require you to give whatever security we consider appropriate, in our sole discretion, and we may suspend any Shipment until that security is provided.
- 8.12 Any Supply delays and associated costs incurred due to a delay in any payment being received by us are your responsibility.
- 8.13 All references to amounts of money are references to the currency set out in the relevant Contract Confirmation or Shipment Schedule provided to you, or as otherwise agreed between us, and are payable in that currency. If for any reason an amount is paid to us in a different currency and on conversion into the relevant required currency (and after deducting any costs or expenses incurred in accepting those funds or their conversion) we realise an amount that is less than the amount due, you must immediately pay any further amounts necessary to ensure that we receive the full amount due in the relevant required currency (including after taking account of any further conversion that is required).
- 8.14 If we agree to electronically transmit to, or receive from, you any documents or information relating to these Terms (including invoices) (together "**Documents**"), the following provisions will apply:
- (a) All Documents will be transmitted and received in accordance with standards specified by us from time to time.
  - (b) You will, at your own expense:
    - (i) provide and maintain the resources necessary to effectively and reliably transmit and receive Documents; and
    - (ii) implement security procedures which are necessary to ensure that transmissions of Documents are protected against improper access.

- (c) Each party will maintain a record of data exchanged pursuant to this clause 8.14 for not less than 12 months following the Supply of Products to which the data relates and allow the other party reasonable access to that record on request.
- (d) Each of us agrees that:
  - (i) a Document passing between us electronically in accordance with this clause 8.14 is deemed to be “signed” by the originating party; and
  - (ii) nothing in this clause 8.14 precludes us from exchanging paper documents, provided that where a Document is sent in both paper form and electronic form, the electronic form of the Document will prevail.

## **9. DEFAULT**

### **9.1 If:**

- (a) we form the view that you have undergone a change of control or other change of circumstance, or you sell or transfer all or a material part of your business, assets or undertaking (or agree to do so), or we conclude that we would be dealing with a different party or subject to different commercial considerations if we were to continue dealing with you;
- (b) you default in any payment due to us (including under these Terms) or we conclude that you are likely to, including where you are unable, or state that you are unable, to pay your debts as and when they fall due or where a liquidator, receiver, receiver and manager, controller, trustee or other insolvency administrator is appointed in respect of you or any (or all) of your assets, or a scheme of arrangement is proposed or approved in respect of you or a mortgagee enters into possession of any of your assets or any similar situation occurs; or
- (c) you are otherwise in breach of these Terms, the terms and conditions of any credit we extend to you (including where you exceed your credit limit with us) or any other agreement between you and us,

then, without limiting the terms and conditions of such credit, or such other agreement, or our other rights, in such circumstances we may, at our option:

- (d) withhold or cancel the relevant Shipment and/or any subsequent Shipment with notice to you but without prejudice to any other action or remedy which we have or might otherwise have had; and/or
- (e) retain any deposit you may have paid (which shall be forfeited by you) and/or draw on any relevant L/C, bank guarantee or standby L/C; and/or
- (f) reclaim and/or resell the Products in your possession or under your control and may enter premises where we believe that Products are stored or held to do so, and recover from you all costs of doing so,

and all monies owing and outstanding by you to us on any account whatsoever will become immediately due and payable (without the requirement for notice from us).

### **9.2 We will not be liable to you for any losses you incur as the result of our exercising any of our rights under this clause 9.**



## 10. WARRANTIES AND LIMITATION OF LIABILITY

- 10.1 Notwithstanding any provision to the contrary in these Terms, these Terms do not exclude or limit the application of any law in New Zealand or any country where such laws apply to the subject matter of these Terms with respect to any Products to the extent that to do so would:
- (a) contravene that law; or
  - (b) cause any part of this clause 10 to be void.
- 10.2 Subject to clause 10.1, we:
- (a) warrant only that each Product at the point of Delivery meets the Specifications or, in the case of Products Delivered pursuant to clause 4.2, the relevant specification referred to in clause 4.2;
  - (b) make no other representations or warranties in respect of the Products, including representations or warranties concerning fitness for purpose or appropriateness for your needs of any Product, and you must assure yourself of these matters having regard to your circumstances;
  - (c) exclude all guarantees, conditions and warranties implied into these Terms (whether by statute, common law, custom of the trade or otherwise) or any Contract Confirmation, Shipment Schedule or Request for Supply.
- 10.3 Without limiting clause 10.2, we may from time to time provide advice, recommendations and statements with respect to the Products. However, we do not warrant or guarantee the accuracy or completeness of that advice, those recommendations or statements or the results obtained through the use of the Products. We expressly disclaim any liability for any damage to you from reliance on such advice, recommendations or statements. Such advice, recommendations and statements are relied on by you at your own risk and you should make other appropriate enquiries having regard to your circumstances. Any sample, description or visual representation or details of a good or product provided by us to you are representative only and the actual Product Supplied may differ.
- 10.4 If any Product is sold to you as stockfood, seconds or any similar classification you acknowledge that:
- (a) the Products are not fit for human consumption and are sold by us on the representation from you that the Products will be exclusively used for the purpose of animal feed; and
  - (b) you will be liable to and indemnify us for all loss or damage (including damage to reputation) that we or any Related Company or Associate of Fonterra may suffer if you breach this clause.
- 10.5 Notwithstanding any other provision in these Terms, but subject to clause 10.1:
- (a) we are not and will not in any circumstances be liable for any claim by you under or in connection with these Terms in contract, tort (including negligence) or otherwise unless notice of the claim is given in writing to us within 30 days of the claim arising, or within any other period prescribed in these Terms;
  - (b) we are not and will not in any circumstances be liable to you or any other person in contract, tort (including negligence) or otherwise for:
    - (i) any loss and/or damage to person or property; or

- (ii) any indirect or consequential loss or for any loss of revenue, profits, goodwill, business or anticipated business, anticipated savings or for any business interruption, loss of data or other indirect or consequential loss or damage,

regardless of whether or not that loss or damage was, or ought to have been, contemplated by us;

- (c) our maximum aggregate liability in respect of claims in connection with each Shipment under these Terms (including the provision of any refunds, credit notes or Product replacements or reworks), whether in contract, tort (including negligence) or otherwise, is limited to:

- (i) if your claim relates to a delay by us in Supplying any of the Products in that Shipment to you, an amount equivalent to 10% of the price you have paid (or will pay) for the Products in that Shipment to which the claim relates plus, if (but only if) there is also a defect in the Products or a failure of the Products to comply with their Specifications, the price you have actually paid for the Products in that Shipment which are defective or do not comply with their Specifications ; or

- (ii) if your claim relates to the total failure by us to Supply any of the Products in that Shipment to you, the price you have actually paid for the Products in that Shipment to which the claim relates, plus an amount equivalent to 10% of the price you have paid (or would have paid) for the Products in that Shipment to which the claim relates; or

- (iii) in all other circumstances, the price you have actually paid for the Products in that Shipment to which the claim relates; or

- (iv) the direct losses or damages that you actually incur or suffer,

whichever is less;

- (d) your sole remedies in relation to any defect in the Products or failure of the Products to comply with their Specifications are limited, at our option, to one of the following, as specified by us:

- (i) refunding all or part of the price of the Products (or offering credit where payment has not then been made); or

- (ii) replacing or reworking all or a portion of the Products or paying for someone else to do so;

- (e) your sole remedy in relation to any delay in Shipment or failure by us to Supply Products to you is a claim for damages, subject to this clause 10; and

- (f) your sole remedies for any breach of these Terms or loss or damage arising from the subject matter of these Terms are expressly set out in these Terms.

10.6 Any reworking of the Products shall be effected at such place as we may specify. We may require you to arrange for the transport, at our cost, of any Products to be reworked or made good.

10.7 You irrevocably grant us the sole control of the defence and all related settlement negotiations and other proceedings, and you shall assist and co-operate with us at your expense, as requested by us, in relation to any third party claim in relation to the Products.

- 10.8 You indemnify us and must keep us indemnified against all claims, suits, actions, demands, loss (including any indirect or consequential loss and any loss of revenue, profits, goodwill, business or anticipated business, anticipated savings and any business interruption, loss of data or other indirect or consequential loss or damage), liability, costs, expenses (including legal expenses on a full indemnity basis and any debt recovery agency fees), judgments and awards made against us or incurred by us to the extent that such is caused (directly or indirectly) by your handling, storage, use or sale of the Products, or by any negligent act or omission or breach of any law applicable to the handling, storage, use or sale of the Products (including as incorporated into another good or service) by you or any of your officers, employees, agents or contractors. This indemnity is a continuing indemnity and is in addition to any statutory rights or remedies we may have or exercise against you.
- 10.9 You agree to take reasonable steps to mitigate any loss or damage you may suffer under these Terms.

## **11. GENERAL**

- 11.1 Nothing in these Terms gives you any right, title or interest in or to any of our assets or rights other than the Products (excluding any intellectual property rights in or relating to them and their packaging and storage, together with any associated goodwill), and then only in accordance with these Terms. Without limiting the foregoing, you agree that any packaging accompanying the Products which identifies the Product as being manufactured or supplied by us, must be disposed of in a manner that prevents its re-use or, if it is to be re-used, must be modified in appearance so that no reference or connection to us can be made.
- 11.2 Any confidential information or intellectual property provided by us in connection with the Products, including the Contract Confirmation and Shipment Schedule, remains at all times our confidential and proprietary information and may be used by you solely to complete the relevant Shipment and for no other purpose and must otherwise be kept in strict confidence by you. You must not disclose to any third party any information provided by us to you unless:
- (a) the information is in the public domain (other than by reason of breach of any confidentiality obligation owed to us by anyone); or
  - (b) the disclosure (including its form and context) is first approved by us in writing,
- and any confidential information provided by us must immediately be returned to us on our request. You must ensure that your officers, employees, agents, contractors and advisers comply with this clause.
- 11.3 All intellectual property which is owned by, or is proprietary to, us at the date of these Terms shall remain owned exclusively by us. Any new intellectual property which is created as a result of, or in connection with, the provision of the Products, or otherwise in connection with these Terms, shall be owned by us. Nothing in these Terms confers on you any right or interest in, or licence to use, or permit to be used, any of our intellectual property. You must not use our intellectual property (including trade marks) without our prior written consent.
- 11.4 You agree as follows:
- (a) The Products are supplied for the purpose of a business and the New Zealand Consumer Guarantees Act 1993 does not apply.
  - (b) You shall not, in relation to the Supply by you of the Products (including as incorporated into another good or service), give or make any undertaking,

assertion or representation in relation to the Products without our prior approval in writing.

- (c) The United Nations Convention on Contracts for the International Sale of Goods does not apply to these Terms or any transaction conducted in accordance with, or pursuant to, these Terms.
- 11.5 These Terms are governed by the laws of New Zealand.
- 11.6 If any Related Company or Associate of us is involved in the provision, Delivery or Supply of Products to you, their acts are deemed to be ours, they benefit from these Terms in accordance with the Contract and Commercial Law Act 2017, and we are entitled to enforce these Terms on their behalf. We also hold these Terms on trust for our officers, employees, agents, contractors and advisers.
- 11.7 Any dispute, difference or claim arising out of or in connection with these Terms, or the subject matter of these Terms, will be referred to and resolved by arbitration in accordance with the UNCITRAL Arbitration Rules ("**Rules**"). The place of the arbitration will be Singapore. The tribunal will consist of one arbitrator appointed in accordance with the Rules. For the purpose of article 6 of the Rules, the appointing authority will be the Singapore International Arbitration Centre ("**SIAC**"), on the basis of the SIAC International Panel. The language of the arbitration will be English.
- 11.8 Any personal information collected by you or us in connection with these Terms must only be used or disclosed for the purposes of ensuring performance of these Terms and any future like arrangement or arrangements. This may include disclosure within your or our organisations and to other parties involved in performing these Terms. You and we agree to comply with relevant privacy laws in respect of any personal information collected in connection with these Terms, any Shipments and any future like arrangement or arrangements.
- 11.9 In these Terms, another grammatical form of a defined word or expression has a corresponding meaning.
- 11.10 Headings are inserted for ease of reference only and do not affect the interpretation of these Terms.
- 11.11 If part or all of any provision of these Terms, the Contract Confirmation or your Request for Supply or its application to any person or circumstance is illegal or unenforceable, the provision will be interpreted as may be necessary to ensure it is not illegal or unenforceable. If any provision or part of it cannot be interpreted in that way, the provision or part of it will be severed from these Terms and the remaining provisions continue in full force and effect.
- 11.12 Any notice given by us under, or failure by us to insist on strict compliance with, any agreement between you and us (including these Terms) or any delay by us in exercising our rights under any such agreement is not a variation or waiver of any provision of that agreement or of any right available to us.
- 11.13 A rule of construction does not apply to the disadvantage of us because we prepared these Terms.
- 11.14 You may not assign or novate any or all of your rights or obligations under these Terms to a third party or purport to do so without our prior written consent (which may be given or withheld in our complete discretion).
- 11.15 All notices under these Terms must be in writing and delivered by you or us to the other at the address that the other specifies from time to time, provided that any notice pursuant to clause 1.3 may be given by us by posting details of the relevant amendments on our

website, and you will be deemed to have received that notice on the day the amendments are posted by us on the website.

- 11.16 A party will not be liable for any failure to perform these Terms if the failure is due to a cause reasonably beyond the control of that party and that party uses its reasonable endeavours to perform despite the cause. In the event that we are unable to Deliver or Supply Products to you due to circumstances reasonably beyond our control (including, without limitation, delays in transportation and associated logistics not caused by us), we will notify you as soon as reasonably practicable, and if we are not able to agree alternative Supply arrangements with you, we may cancel the relevant Shipment(s) or any part thereof, without resulting liability, resell the relevant Products, and/or allocate the available Products amongst you and any of our other customers as we see fit. This clause does not excuse a party from any obligation to make a payment when due.
- 11.17 Clerical errors or omissions, whether in compilation or otherwise in any quotation, Contract Confirmation, Shipment Schedule, Request for Supply, acknowledgement, invoice or other such documentation, are subject to correction by us.
- 11.18 Unless we otherwise expressly agree in writing, you acknowledge and warrant that any Products you purchase under these Terms are purchased solely for your own use and that you will not on-sell the Products in any market.

## 12. DEFINITIONS

- 12.1 In these Terms, unless the context otherwise requires:

**we, our** or **us** means Fonterra Ingredients Limited and its officers, employees, agents, contractors and advisers;

**you** or **your** means the purchaser or intending purchaser of the Products from us and includes any agent, contractor or representative of you (including your storage service provider, any carrier commissioned by you or anyone who transports the Products for you or on your behalf or processes or on-sells or on-provides goods or services incorporating the Products);

**Associate** has the same meaning as the definition of “Associated Person” in the Financial Markets Conduct Act 2013;

**Contract Confirmation** means the contract confirmation or other such documentation or communication (written or oral) that we provide to you which confirms that we have accepted your Request for Supply or that your Request for Supply is being processed by us;

**Deliver** means to deliver Products to you (as evidenced by the risk transfer from us to you in the Products occurring in accordance with the Incoterms Basis) and “**Delivery**” and “**Delivered**” have corresponding meanings;

**Duty** means any tax, impost, charge or levy of an export, customs, excise, import or similar nature applicable to the exportation, importation, transportation, sale, use or ownership of any Product and/or the performance of any incidental service from time to time under any law applicable thereto;

**Expected Shipment Period**, in respect of a Product, means the period between the first expected delivery date and the last expected delivery date specified in the Contract Confirmation and/or Shipment Schedule for that Product;

**Fonterra** means Fonterra Co-operative Group Limited;

**Incoterms** means the international rules for the interpretation of trade terms as published by the International Chamber of Commerce, Paris, France, in effect at the time of the contract;

**Incoterms Basis** means, in respect of any Product, the basis for delivery in Incoterms which is specified in relation to that Product in the Contract Confirmation for that Product, or which is otherwise agreed between us. If no Incoterm is so specified or agreed by us, then the applicable Incoterm will, at our election, be either:

- (a) the Incoterm held in our customer information system in respect of your previous Shipment; or
- (b) CFR;

**Products** means any goods or products Supplied under these Terms and includes any services supplied or deemed to be Supplied by us incidental to the Products and/or under these Terms;

**Related Company** means a “related company” as that expression is defined in the New Zealand Companies Act 1993 (read as if the word “company” for the purposes of that definition includes any body corporate, wherever incorporated or established);

**Request(s) for Supply** means the orders or other such documentation or communications (written or oral) that we receive from you requesting the Supply of a certain quantity of Product, on a specified pricing basis, to one or more destinations;

**Sales Tax** means any tax or levy of a sales, value added or goods and service nature (including, but not limited to, New Zealand goods and services tax) applicable to the sale and/or Supply of any Product from time to time under any law applicable thereto and includes stamp duty on these Terms or any transaction contemplated by them;

**Shipment** means a Supply of Products in accordance with the specific volume/delivery date shipment reference forming part of the Contract Confirmation and/or Shipment Schedule for those Products;

**Shipment Schedule** means the volume/delivery date shipment profile forming part of the Contract Confirmation, as supplemented by any subsequent delivery notices, purchase orders or such other communication from you (in each case accepted by us) further specifying or modifying that volume/delivery date shipment profile;

**Specifications** in respect of a Product, means the specifications as set out in the Fonterra selling specification for the product type described (as available on request from us) as supplemented by the Contract Confirmation and/or Shipping Schedule;

**Supply** means the delivery of a Product to the destination specified in the Contract Confirmation and/or Shipping Schedule for that Product; and

**Terms** means these terms and conditions of sale.