



## CARGILL FOOD INGREDIENTS – AUSTRALIA - TERMS AND CONDITIONS – NOVEMBER 2017

**1. TERMS TO GOVERN.** These terms and conditions shall constitute the sole terms and conditions of sale. No terms or conditions whether contained in Buyer's purchase order or elsewhere, shall be binding on Seller unless agreed to in writing by Seller. If there is any inconsistency between the Contract and these terms and conditions the provisions of the Contract prevail to the extent of any inconsistency.

**2. RISK OF LOSS.** Risk of loss of the product shall pass to Buyer at the time the product is placed in possession of Buyer or Buyer's agent.

**3. TITLE. (1)** Subject to the following provisions in this clause 3, legal and beneficial ownership (**Ownership**) of the product remains with Seller and does not pass to Buyer until Buyer (i) pays in full and in clear funds any amount it owes Seller on any account at which time title passes to Buyer; or (ii) resells the product pursuant to a right under these terms and conditions, at which time title passes the third party purchaser. **(2)** While Ownership of the product remains with Seller: (i) Buyer agrees to clearly designate the product as Seller's property and store the product in such a way that it is identified as the property of Seller; (ii) Buyer agrees to maintain the product in good order and condition; (iii) Seller authorises Buyer in the ordinary course of its business to sell the product for full consideration. This authority is revoked from the time that: (A) a default occurs; or (B) Seller notifies Buyer in writing that this authority is revoked; and Buyer agrees to: (a) advise Seller immediately of any default or any action by third parties (including any of its creditors) affecting Seller's interest in the product; and (b) Seller, as Buyer's agent, entering the premises where any product are or may be stored and remove them, without being responsible for any damage caused in doing so. Seller may resell any of the product and apply the proceeds of sale in reduction of the amounts owing to Seller. **(3)** Seller may apply any payments received from or on behalf of Buyer in reduction of the amount owing to Seller, as Seller thinks fit. **(4)** If Buyer resells or uses any product (i) before Ownership of the product has passed to Buyer or (ii) where Ownership of the product has passed in accordance with clause 3(1)(ii), the proceeds of such sale or use will be received and held by Buyer (in whatever form) in trust for Seller to the extent of the amount owing (where Seller's interest as beneficiary under that trust will be that portion of the proceeds which is equivalent of the amount owing to Seller and the balance of the proceeds (if any) will be Buyer's beneficial interest under that trust).

**4. PPSA. (1)** In addition to the provisions of clause 3, Buyer: (i) acknowledges and agrees that: (A) this document constitutes a security agreement and gives rise to a purchase money security interest in favour of Seller over the products supplied or to be supplied to Buyer, as grantor, pursuant to these terms and conditions, which secures the purchase price for all product supplied by Seller to Buyer from time to time; (B) the security interest attaches to the product purchased by Buyer on delivery of the product to Buyer or a third party at Buyer's direction; and (C) Seller, as secured party, is entitled to perfect its security interest pursuant to the PPSA (ii) grants to Seller a security interest in the product (and the proceeds of sale of the product) as security for all of Buyer's obligations to Seller (including payment to Seller of the purchase price for the product) which security interest Seller can register or perfect by any means possible in the jurisdiction of Buyer (and any other jurisdiction Seller deems necessary or desires) to ensure that Seller has an enforceable security interest against Buyer in the product (and the proceeds of sale of the product); (iii) agrees to do all things and execute or arrange for execution of all documents Seller requires to ensure Seller acquires enforceable, perfected, maintained first ranking security interest in the product which attaches to the product (including but not limited to a purchase money security interest in respect of the product supplied) in the relevant jurisdiction(s); (iv) will indemnify Seller for any costs Seller incurs in registering, maintaining, discharging and/or enforcing the security interest created by these terms and conditions; (v) agrees not to assign, charge, encumber, mortgage, or permit any lien to arise over, or any security interest (other than Seller's) to attach to product, or permit the product to become an accession, without Seller's written consent; and (vi) waives its right under the PPSA to the maximum extent permitted by law, to s 95, s 96, s121(4), s123, s129, s130, s132(2), s132(3)(d), s132(4), s135, s142 and s143; and (vii) waives any right it may otherwise have to receive a copy of any financing statement, financing change statement or verification statement registered or received by Buyer in respect of any security interest created under or in connection with this. **(2)** Without limiting clause (4)(1) and if s275(7) of the PPSA applies, each party agrees not to disclose any information of the kind referred to in s275(1) of the PPSA that is not publicly available. **(3)** In this clause 4 the following terms have the respective meaning given to them in the Personal Property Securities Act 1999 (PPSA): grantor, perfected, proceeds, purchase money security interest, register, secured party, security agreement and security interest.

**5. PAYMENT AND CREDIT. (1)** Unless otherwise specified in the Contract all prices are delivered prices with freight for Buyer's account and are denominated in and shall be paid in Australian dollars. Interest will accrue daily on any outstanding payments payable by Buyer to Seller at a rate of 1.5% per calendar month. **(2)** Seller may in its absolute discretion grant Buyer a line of credit, which shall be expressed as a maximum amount (**Maximum Credit**), for the sole purpose of purchasing from Seller product in accordance with and subject to these terms and conditions (**Credit Trading Facilities**). **(3)** Buyer must not exceed the Maximum Credit at any time and any Contract which causes the Credit Trading Facilities to exceed the Maximum Credit must be paid by Buyer on delivery of the product. **(4)** If Seller suspects Buyer represents a credit risk, Seller in its absolute discretion, may by notice in writing to Buyer reduce the Maximum Credit or cancel all Credit Trading Facilities effective immediately, and all open contracts must be executed and delivered as specified by Seller, under any revised payment terms.

**6. DELIVERY: (1)** Unless otherwise provided for herein, if the Contract provides for deliveries over a period of one (1) month, Seller shall not be obligated to deliver in any thirty (30) day period more than approximately equal monthly quantities, in relation to the total amount of the Contract. Any time stated for delivery by Seller is an estimate only. **(2)** Seller will use its reasonable endeavours to deliver the product within the Delivery Period but will not be liable to Buyer for any loss sustained due to delay outside the control of Seller which includes the action or inaction of any third parties. **(3)** If Seller is unable, for any reason, to supply the product from

the location set forth in the Contract, then Seller may supply the product from another location, to the extent it is available, subject to Buyer's agreement to payment of all increased freight costs. **(4)** Buyer shall furnish complete delivery instructions in sufficient time to enable Seller to perform its obligations hereunder. Seller shall not be obligated to make delivery in absence thereof. If more than one delivery is called for, each delivery is to be considered a separate contract for the purposes of furnishing complete delivery instructions by Buyer. **(5)** Buyer shall provide only transportation equipment acceptable for food grade transportation. **(6)** The destination routing of shipments will be at Seller's option. **(7)** If Buyer delays, fails or refuses to take delivery then payment shall become immediately due to Seller. **(8)** The product may be stored by Seller at Buyer's risk and expense if Buyer delays, fails or refuses to take delivery of the product. **(9)** Unless directly caused by an act of Seller, (i) any increase in applicable freight rates or taxes shall be for Buyer's account (ii) all demurrage or detention charges shall be for Buyer's account.

**7. USE OF PRODUCT: Buyer acknowledges and agrees with Seller that: (1) use of the products supplied are beyond the control of Seller; and (2) Buyer has determined the appropriate use, merchantability or fitness for subsequent on-sale of the product and assumes all risks and liabilities for any loss, damage or injury resulting from the use or subsequent on-sale of the product, either alone or in combination with other commodities or products.**

**8. WARRANTY AND LIMITATION OF LIABILITY. (1)** Seller represents and warrants that, as of the time and at the place of delivery, (i) Seller has the right to convey good title to the product and (ii) the product and/or services delivered will conform to the specifications set out in the Contract. Warranties expressly provided by Seller are exclusively for the benefit of the Buyer. **(2)** Except as expressly warranted by Seller in respect of a specific product or products, Seller does not make any representation or warranty as to the quality, fitness for purpose or appropriate use of or subsequent sale of the product **and any information provided by Seller, its employees, servants or agents regarding the products sold and their potential use will not be construed as contractual conditions or warranties.** Seller excludes all warranties and conditions other than such express warranties and all implied conditions and warranties, howsoever arising (including but not limited to, warranties as to merchantability and fitness for a particular purpose), except any implied conditions and warranties the exclusion of which would contravene any statute or cause any part of the Contract to be void (**Non Excludable Condition**). **(3)** To the maximum extent permitted by law, Seller's liability to Buyer for breach of any Non Excludable Condition is limited, at Seller's option to, refunding the price of the relevant product or services in respect of which the breach occurred or to supplying those products and services respectively again or to paying the cost of having those products and services respectively supplied again. **(4)** Except for liability for breach of any Non Excludable Condition and to the maximum extent permitted by law, in respect of any breach by the Seller or any negligent act or omission by the Seller (whether in relation to any contract between the parties or otherwise): (i) in no circumstances will Seller be liable for any loss of profits or special, consequential, punitive, incidental loss or damage or indirect loss or damage (including, without limitation, any and all loss of profit, loss of revenue, loss of goodwill or business, loss of reputation, loss of opportunity, increased financing costs or loss of savings, even if such loss or damage could reasonably be considered to arise naturally from that breach or event, fact, matter or circumstance, whether arising in contract, tort or equity or under statute) (ii) without limiting paragraph (3) above Seller's total liability to Buyer for any single occurrence or event or series of related events arising under or in connection with this Agreement shall not exceed \$50,000.00 or three times the total consideration paid under the Contract, whichever is greater.

**9. FORCE MAJEURE: (1)** Seller shall be excused for failure to deliver or delay as a result of conditions beyond Seller's reasonable control, including, but not limited to, acts of governmental authorities, embargo, blockade, sanctions, strikes, shortage of raw materials, breakdown, shortage or non-availability of transportation facilities or equipment, power, gas or water outages (**FM Event**). **(2)** If Seller is affected by a FM Event (a) Seller must use reasonable endeavours to remove, overcome or minimise the effects of that FM Event. (b) If FM Event is not overcome after a period of sixty (60) days either party shall have the right to cancel any unperformed portion of the Contract by giving ten (10) days written notice to the other party.

**10. INSOLVENCY/IMPAIRED FINANCIAL CONDITION** If Buyer becomes Insolvent, its financial condition is impaired or it fails to tender any payment hereunder when due the whole sum owing by Buyer shall become immediately due and payable and **(1)** Seller may require Buyer to pay cash in advance of shipment on remaining deliveries under the Contract; **(2)** Seller may suspend further shipment without notice to Buyer until all amounts owing are paid or security for payment of future supplies is provided to Seller's satisfaction **(3)** Within 48 hours of receipt of Seller's demand, Buyer must, deliver to Seller a marginal deposit not exceeding the difference between the Contract price of the undelivered product and the market price of such product on the day the demand was sent. Without prejudice to other legal remedies Seller may elect to treat failure to remit such marginal deposit within the time specified as, a total breach of this Contract or, a total breach of all open Contracts between Buyer and Seller (or its associates), and pursue legal and equitable remedies; **(4)** Seller may terminate the Contract effective immediately and seek all available remedies from Buyer. In this clause "**Insolvent**" means bankrupt, unable to pay debts as and when they fall due, in receivership, in receivership and management, in liquidation, in provisional liquidation, under any form of administration, wound up, dissolved, deregistered, subject to any arrangement, assignment or composition with creditors, protected from creditors under any statute or in receipt of protection under statute.

**11. DEFAULT AND TERMINATION: (1)** If either party breaches any material obligation under the Contract, the non-breaching party may give thirty (30) day notice of termination, and if the breach has not been remedied during that period, may terminate the Contract. **(2)** For the purposes of this clause 11, material obligations of Buyer include Buyer (i) furnishing delivery instructions within the time specified, (ii) ordering any shipment hereunder within the time specified, (iii) accepting any shipment properly tendered, (iv) tendering any payment when due. **(3)** Termination, pursuant to this clause 11, while being in itself a remedy for breach, shall not preclude any other legal or equitable remedy which is available to the terminating party. The parties agree damages of Seller shall, in the event of Buyer's breach, include the cost of resale of the product.

**12. GST: (1)** This clause 12 survives the expiry or termination of the Contract. **(2)** Words defined in A New Tax System (Goods and Services Tax) Act 1999 (Cth) have the same meaning in this clause 12. **(3)** Unless otherwise expressly stated, any amounts payable for a supply made under this document are exclusive of GST (**GST exclusive amount**). **(4)** Where under the Contract a taxable supply is made, an amount equal to the GST payable on the taxable supply (**GST amount**) must be paid in addition to, at

the same time and in the same manner as the GST exclusive amount otherwise payable for the supply. **(5)** The party, who receives consideration, whether monetary or otherwise, must issue a tax invoice to the other party in a form which complies with the GST law in a timely manner. The payer is not obliged to pay any amount until it has received a valid tax invoice in relation to the relevant supply. **(6)** If an adjustment event arises in relation to any taxable supply made under the Contract that gives rise to an increasing adjustment or decreasing adjustment the GST amount must be adjusted accordingly and where necessary a payment must be made to reflect that increasing adjustment or decreasing adjustment. Immediately after the adjustment event arises the supplier must provide a valid adjustment note to the recipient. **(7)** If a party (**the first party**) is required under the Contract, to pay for or reimburse a cost, expense or outgoing of the other party, the amount to be paid by the first party is the sum of: (a) the amount of the cost, expense or outgoing less any input tax credits in respect of the cost, expense or outgoing that the other party (or the representative member of a GST group of which it is a member) is entitled; and (b) if the payment by the first party is consideration for a taxable supply, an amount equal to the GST amount payable by the other party in respect of the taxable supply.

**13. PRIVACY:** **(1)** Subject to any law to the contrary, provided Buyer has not indicated otherwise, Buyer authorises Seller to collect and use any information related to Buyer and the performance of the Contract (which includes but is not limited to Buyer's personal information) for the purpose of managing Seller's commercial relationship with Buyer including but not limited to (i) providing Buyer products or services which Buyer has agreed to obtain from Seller and/or for any other purposes relating to Seller's business operations and Seller's dealings with Buyer. **(2)** Buyer agrees and acknowledges that Seller: (i) may transfer information overseas and disclose it to others (including, without limitation, contractors and buyers); (ii) may collect information from an entity other than Seller including brokers used by Seller. **(3)** Buyer can withdraw its consent at any time by calling the 03 9268 7200. Seller's Privacy Policy, located at [www.cargill.com.au](http://www.cargill.com.au) contains information about how personal information held by Seller may be accessed and corrected and how complaints can be made and are managed. **(4)** If Buyer wishes to give Seller any information about an individual other than itself, then it agrees to ensure the individual to whom that information relates agrees that Seller may use and disclose information about him or her in accordance with this clause 13.

**14. NON COMPLIANT PRODUCT:** **(1)** Any claim by Buyer that products do not meet the specifications set out in the Contract (**Non-Compliant Products**) must be made within 48 hours after delivery of the product or otherwise Seller will have no liability to Buyer. Buyer irrevocably waives and releases all claims that are not made within that period. **(3)** Where Non-Compliant Products have been supplied and notified pursuant to (1): (i) Buyer must, at Seller's election, either arrange for the certified destruction of the Non-Compliant Products or return the Non-Compliant Products to Seller; and (ii) Seller must, if requested by Buyer, supply replacement compliant product as soon as reasonably practicable. **(4)** The applicable undertakings in (3) will be carried out: (i) at Buyer's expense, if the non-compliance was not caused by a defect arising from an act or omission of Seller; or (ii) otherwise, at Seller's expense.

**15. PRODUCT RECALL:** **(1)** Each party must notify the other immediately by telephone, and confirm in writing, if it becomes aware of any circumstances that might necessitate a recall of any of the product. **(2)** The parties will give each other any assistance that shall reasonably be required to recall, as a matter of urgency, product from the market. **(3)** Notwithstanding anything to the contrary herein, if Seller notifies Buyer that any of the product needs to be recalled or otherwise withdrawn from the market and Buyer refuses or otherwise fails to do so in a timely fashion, Buyer agrees to indemnify Seller from and against any and all loss, cost, damage and expense incurred by Seller as a result of such failure or refusal. **(4)** Subject to clause 15(3) any product recall which is brought about by any actual or defect in, contamination of or damage to the products (**Defects**) will be at the cost of Seller unless the Defects was caused by Buyer, in which case the product recall will be at the cost of Buyer. **(5)** In the event of a product recall or customer complaint, Buyer will not make any press or other announcement or release any information without Seller's prior written approval as to the form and manner of the announcement or release unless, and to the extent that it is required to be made by Buyer by law. **(6)** Seller may provide notification and advice in respect of a product recall or customer complaint to any of Buyer's customers who are directly affected by the recall or customer complaint, provided that Seller provides Buyer with a reasonable opportunity to review and provide input into the form of that notification or advice. **(7)** Both parties will maintain appropriate, up to date and accurate records to enable the immediate recall of any products or batches of products from relevant markets.

**16. GENERAL:** **(1)** The Contract shall be governed by the laws of Victoria, Australia and each party submits to the non-exclusive jurisdiction of courts in that State. **(2)** Any failure by Seller to insist on strict compliance with these terms and conditions or the Contract will not constitute a variation or waiver of such terms or any other right that is available to Seller. **(3)** If part or all of any provision of the Contract, the terms and conditions or its application to any person or circumstance is illegal or unenforceable, the provision will be interpreted so as to ensure it is not illegal or unenforceable or, if it cannot be so interpreted, the provision or part of it will be severed and the remaining provisions will remain in force. **(4)** A covenant, undertaking, representation, warranty, indemnity or agreement made or given by: (i) two or more parties; or (ii) a party comprised of two or more persons, is made or given and binds those parties or persons jointly and severally. **(5)** Consignment: Where products are to be delivered in more than one consignment, the Contract shall be deemed to be a separate contract in respect of each consignment. Buyer shall not be entitled to reject an entire consignment because of any default occurring in some other consignment on the same Contract. Notwithstanding any express or implied election by Buyer, Buyer agrees that Seller may appropriate, allocate and apply any payments received from Buyer against any amounts Buyer owes to Seller in respect of any other consignment. **(6)** Neither the Contract or the terms and conditions creates an agency or other fiduciary relationship between the parties. **(7)** These terms and conditions and the Contract supersede all previous agreements, understanding about their subject matter and embodies the entire agreement between the parties about their subject matter.