

# YENDA GROUP

## SALES TERMS AND CONDITIONS

### YENDA PRODUCERS CO-OPERATIVE SOCIETY LTD

ABN 79 134 587 268  
59-61 Mirrool Avenue  
Yenda NSW 2681

IF YOU DO NOT FULLY UNDERSTAND THESE TERMS AND CONDITIONS, PLEASE SEEK INDEPENDENT LEGAL ADVICE.

THESE TERMS AND CONDITIONS APPLY TO THE SUPPLY OF GOODS AND SERVICES BY THE SELLER, AS DEFINED IN THIS DOCUMENT.

### 1. DEFINITIONS

In these Terms and Conditions, unless the context otherwise requires:

**"Accounts"** means profit and loss accounts and balance sheets together with statements, reports and notes, including a director's report or an auditor's report, attached to or intended to be read with any of those profit and loss accounts or balance sheets.

**"ACL"** means the *Australian Consumer Law* contained in Schedule 2 of the *Competition & Consumer Act 2010* (Cth).

**"Associated Entities"** has the meaning given to that term in the Corporations Act.

**"Business Day"** means weekdays and excludes Saturdays, Sundays and public holidays in New South Wales.

**"Buyer"** means you or the person named in the Sales Invoice and/or Credit Agreement.

**"Claim"** means any claim, demand, allegation, loss, liability, action, suit, proceeding, damage or cost of whatsoever nature.

**"Collateral"** has the meaning given under the PPSA and specifically in relation to these Terms and Conditions, personal property that is not used predominately for personal, domestic or household purposes and identified in these Terms and Conditions as having an attached Security Interest.

**"Consequential Loss"** means loss or damage, whether direct or indirect, in the nature of loss of profits, loss of revenue, loss of production, loss of anticipated savings or business, pure economic loss, loss of opportunity and any form of consequential, special, indirect, punitive or exemplary loss or damages, whether or not a party was advised of the possibility of such loss or damage.

**"Contract"** has the meaning given to that term in clause 3(a).

**"Corporations Act"** means the *Corporations Act 2001* (Cth).

**"Credit Agreement"** means any agreement between the Seller as "Credit Provider" and the Buyer as the "Customer" for or in relation to the sale and purchase of Goods or Services on credit.

**"Crops"** means any and all cultivated plants and subsequent Proceeds, grown on a commercial scale that are owned, occupied, leased, used or share-farmed by the Buyer (whether severally or jointly) in which the Seller's Services and/or Goods have been applied or otherwise used by the Seller to enable the crops to be sown or grown.

**"Deposit"** has the meaning given to that term in clause 5(e).

**"Event of Default"** means any event or circumstance specified as such in clause 14 or otherwise specified in this document as an Event of Default.

**"Event of Force Majeure"** means events or causes outside the reasonable control of the parties, and includes any acts of God, war, riots, strikes, lock outs, trade disputes, fires, break downs, mechanical failures, interruptions of transport, Government action, pandemics or epidemics, or any other cause whatsoever, whether or not of a like nature to those specified above.

**"Fee For Service"** means the document of that name, evidencing a Contract between the Seller and the Buyer, for the provision of specified services over a specified time period, and which is subject at all times to these Terms and Conditions.

**"Goods"** means any item of whatsoever nature which is sold or to be sold by the Seller to the Buyer and includes any future goods to be purchased by the Buyer.

**"GST"** means the tax payable on taxable Supplies within the meaning of the GST Act.

**“GST Act”** means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

**“Insolvency”** has a comparable meaning to Insolvent.

**“Insolvent”** means:

- (a) When the Person in question is unable to pay their debts when they fall due;
- (b) If a corporation is (or states that it is) under administration or insolvent (each as defined in the Corporation Act);
- (c) A Liquidation occurs in relation to a Person;
- (d) If a Person is subject to any arrangement, assignment, moratorium or composition, protected from creditors under any applicable law or dissolved (in each case, other than to carry out a reconstruction or amalgamation while solvent on terms approved by the Seller);
- (e) An application is made to a court for an order, or an order is made that a corporation be wound up or that a liquidator be appointed to a corporation;
- (f) A creditor’s petition or debtor’s petition is filed against a Person; or
- (g) A receiver, manager, trustee, administrator or similar official is appointed over any or all of the assets or undertaking of a Person.

**“Intellectual Property Rights”** means all registered and unregistered rights in respect of copyright, designs, circuit layouts, trade marks, know-how, confidential information, patents, inventions, discoveries and domain names and all other intellectual property as defined in article 2 of the Convention establishing the World Intellectual Property Organisation 1967.

**“Liquidation”** includes provisional liquidation, administration, receivership, appointment of Controller, compromise, arrangement, amalgamation, reconstruction, winding up, dissolution, assignment for the benefit of creditors, arrangement or compromise with creditors, bankruptcy or death.

**“Livestock”** means any and all domesticated animals, raised in an agricultural setting for the purpose of providing labour or produce commodities including meat, eggs, milk, fur, leather or wool, that are owned, managed, grown, leased, licenced, farmed or trained by the Buyer and includes all Proceeds.

**“Loss”** includes all liability, loss, damages, costs and expenses, whether in contract, tort (including negligence), statute or otherwise.

**“Moneys”** means any and all moneys advanced by the Seller to the Buyer on credit terms from time to time pursuant to any Credit Agreement and includes all legal fees and interest incurred by the Seller in recovering any and all money advanced from the Seller to the Buyer.

**“Order”** means the Buyers request for Goods and/or Services to be provided by the Seller.

**“Person”** includes an individual, a body politic, a corporation, an association (incorporated or unincorporated), a statutory authority, a trust of any form or structure, a partnership, and any other authority or persons identified as the Buyer.

**“PPSA”** means the *Personal Property Securities Act 2009* (Cth) as amended from time to time.

**“PPS Register”** means the personal property securities register established pursuant to section 147 of the PPSA.

**“Proceeds”** has the same meaning given to it in section 31 of the PPSA.

**“Purchase Money Security Interest” (“PMSI”)** has the same meaning given to it in section 14 of the PPSA.

**“Related Body Corporate”** has the meaning given to that term in the Corporations Act.

**“Security Interest”** has the meaning given under the PPSA and includes any security interest arising from:

- (a) the purchase of Goods on retention of title terms entered into by the Buyer and Seller in the ordinary course of the Buyer’s business, in accordance with these Terms and Conditions or otherwise, as long as the purchase price is paid and all obligations relating to the purchase are performed when due (unless the obligations are contested in good faith); and
- (b) a lease or bailment entered into by the Buyer in the ordinary course of the Buyer’s business and on the usual terms of trading of the lessor or bailor, as long as the monetary or other obligations under the lease or bailment are paid for or performed when due.

**“Sales Invoice”** means the sales invoice issued by the Seller to the Buyer which details the Goods and/or Services to be provided by the Seller.

**“Seller”** means Yenda Producers Co-operative Society Ltd (ABN 79 134 587 268) and any and all its successors, assignees, Related Bodies Corporate, Associated Entities, involved in the supply of Goods, the provision of Services, or in the fulfilment of any Order, including (for the avoidance of doubt):

- i. Yenda Producers Distribution Pty Limited (ABN 63 064 495 558);
- ii. Yenda Prods – Irrigation Pty Ltd T/A Riverina Water Engineering (ABN 79 119 484 025);
- iii. Yenda Prods Grain Pty Ltd (ABN 88 607 912 014); and
- iv. Spencer & Bennett – Yenda Prods Pty Ltd (ABN 97 080 911 959).

**"Seller's Intellectual Property"** means any and all of the Seller's Intellectual Property Rights.

**"Services"** means the provision of advice and information by the Seller to the Buyer in relation to horticulture, agronomics, irrigation design or animal health and production, and any other specified services stipulated in a Fee for Service.

**"Terms and Conditions"** means these terms and conditions.

**"Third Party Purchaser"** means any third party to whom the Buyer sells Goods, Crops or Livestock.

**"Website"** means [www.yendaprods.com.au](http://www.yendaprods.com.au).

## 2. INTERPRETATION

- (a) Words importing the singular shall be deemed to include the plural and vice versa.
- (b) Words importing a gender shall be deemed to include all genders.
- (c) The headings in these Terms and Conditions are provided for convenience only and do not affect the interpretation thereof.
- (d) A reference to "dollar" or "\$" is reference to an amount in Australian currency.
- (e) A reference to a "law" is reference to the laws of New South Wales.

## 3. THE CONTRACT AND ALTERATION TO TERMS AND CONDITIONS

- (a) A binding contract between the Buyer and the Seller for the supply of Goods and/or the provision of Services, comes into existence upon acceptance (whether in writing or otherwise) by the Seller, of an Order or Fee for Service (whether such Order or Fee for Service is the subject of a quotation or otherwise, and whether the Order is in writing or otherwise), on these Terms and Conditions and any additional terms and conditions contained within any quotation issued by the Seller (each, a **Contract**).
- (b) Unless the parties otherwise agree in any concluded Contract, these Terms and Conditions may be altered or amended at any time by publication on the Seller's Website, or by providing the Buyer with notice of the altered or amended Terms and Conditions in another effective way. It is the Buyer's responsibility to review the Terms and Conditions prior to placing an Order or confirming a Fee for Service.
- (c) The Terms and Conditions applying to any Order or Fee for Service and the subsequent Contract which comes into existence are those in force at the time the Buyer placed the Order or confirmed the Fee for Service, and any change to the Terms and Conditions pursuant to sub-clause (b) will apply only in respect of Contracts coming into existence after the date of the change.
- (d) By placing an Order, confirming a Fee for Service, or accepting delivery of Goods, the Buyer expressly acknowledges and agrees to be bound by, and will be deemed to have accepted, these Terms and Conditions (as updated from time to time pursuant to sub-clause (b)). These Terms and Conditions will prevail over existing or subsequent terms and conditions set out in any document (including, for the avoidance of doubt, any Order of the Buyer), which the Buyer directly or indirectly provides to the Seller and such other terms and conditions are rejected by the Seller.
- (e) The Buyer acknowledges and agrees that the Seller enters into a Contract on its own behalf and for the benefit of its Related Bodies Corporate and Associated Entities, and its and their respective officers, employees, agents or subcontractors, and the Seller holds that benefit on trust for such persons and entities and can, if requested, enforce these Terms and Conditions or a Contract on their behalf.

## 4. QUOTATION

- (a) Any quotation provided to the Seller for Goods or Services may be withdrawn by the Seller at any time prior to acceptance by the Buyer, and is not to be construed as an obligation on the Seller to supply Goods or Services, in accordance with these Terms and Conditions or otherwise, until that quotation has been accepted by the Buyer.
- (b) While the Seller takes care in preparing quotations, the Seller's costs of supplying the Goods or Services may vary, and so the Seller is entitled to vary any quotation at any time prior to the quotation being accepted by the Buyer. The Seller may also vary any quotation at any time (even after the Buyer has accepted it) to correct any material or blatant errors and omissions in the quotation.
- (c) Unless otherwise stated, quotations provided by the Seller:
  - i. are exclusive of GST
  - ii. may include a requirement for the payment of a Deposit; and
  - iii. may include a delivery fee (in which case, the quotation is inclusive of delivery in one movement only, to the agreed designated location).
- (d) Prices stated in any quotation are:

- i. current as at the date that quotation is issued, subject to sub-clause (b) above
- ii. subject to any written conditions (other than those set out in these Terms and Conditions) specified in that quotation, and any changes to the factual basis on which that quotation was provided; and
- iii. strictly confidential, and the Seller retains the right to withdraw the quotation, at any time prior to acceptance by the Buyer, if prices are disclosed by the Buyer to any other party.

## 5. PRICE

- (a) Because there may be delays between when an Order is placed and when Goods are supplied, the Buyer understands that such Goods are subject to variable pricing and therefore, subject to sub-clause (c) below (where applicable), the final price payable in relation to such Goods will be the Seller's current price at the time of delivery, or if delivery is not required, the current price at the date of the Sales Invoice, subject to any contrary agreement (if any) between the Seller and the Buyer regarding price.
- (b) The price of the Services will be as notified in writing by the Seller to the Buyer, whether in a quotation or otherwise, prior to commencement of the work and may include travel costs.
- (c) In addition to the rights under sub-clause (a), and because there may be significant additional costs incurred by the Seller in supplying the Goods or Services (such as, for example, changes in the source of Goods, or the location for the provision of Services, or additional lift charges, or transport and other booking fees), the Seller reserves the right to vary prices for Goods and Services at any time, on the provision of 7 days' prior notice to the Buyer (the **Variation Notice**). The Seller cannot provide a Variation Notice in respect of Goods or Services which it has already supplied to the Buyer. Through that Variation Notice, the Seller may make any variations to the pricing for Goods and Services which are reasonable to compensate the Seller for relevant changes affecting the Seller's obligations under these Terms and Conditions. The Buyer will be entitled to cancel any affected Order made prior to the date of the Variation Notice in the event that it decides not to accept the Variation Notice, by giving the Seller written notice within 7 days from the date of the Variation Notice. The Buyer's sole liability for cancellation is limited to the charges incurred by the Buyer in respect of any Goods or Services supplied by the Seller prior to the date of such cancellation (at the pricing in effect immediately prior to the Variation Notice). The varied pricing will only apply to existing Orders after expiration of the 7 day notice period or for new Orders placed after the date of the Variation Notice.
- (d) Unless otherwise agreed in a quotation or otherwise, the price for Goods do not include any third-party costs associated with delivery of Goods, including but not limited to costs incurred by the Seller arising out of late notification by the Buyer of a change to agreed delivery address or schedule, storage charges where Goods are not collected immediately upon being made available or demurrage costs incurred by the Seller. The Seller will exercise its best endeavours to notify the Customer of such third-party costs, once they are known to the Seller. For the avoidance of doubt, the third-party costs must be paid by the Customer to the relevant third party, or must be reimbursed to the Seller by the Customer in circumstances where the Seller has incurred the costs directly.
- (e) In certain circumstances, such as where the sale of Goods or the provision of Services requires the use of pallets or containers or other third party equipment (**Third Party Equipment**), the Seller may require the payment by the Buyer of a deposit as security in relation to that Third Party Equipment, at the time at which an Order is placed or accepted or a Contract comes into existence (the **Deposit**). Where it is possible, the Seller will include the details for the Deposit in a Quotation. Otherwise, the Seller will notify the Buyer in writing of the requirement for the payment of a Deposit as soon as it is known. For the avoidance of doubt, the Seller may deal with the Deposit as it sees fit. On return of the Third Party Equipment, without loss or damage, in accordance with any conditions associated with the return of that Third Party Equipment:
  - where the Buyer has a Credit Agreement with the Seller, an amount equivalent to the Deposit will be credited to the Buyer's trade account; and
  - where the Buyer does not have a Credit Agreement with the Seller, the amount of the Deposit will be refunded to the Buyer.

## 6. PAYMENT

- (a) The Seller must issue to the Buyer a Sales Invoice in respect of the Goods and / or Services.
- (b) Unless the Seller grants credit to the Buyer under a Credit Agreement and subject to the Seller's right to withdraw such credit pursuant to the terms of that Credit Agreement, payment for Goods and/or Services purchased from the Seller must be made by the Buyer in immediately available funds on or immediately prior to delivery of the Goods or performance of Services.

- (c) Where the Buyer has a Credit Agreement with the Seller, the Buyer shall ensure that payment for the Goods and/or Services is made to the Seller by no later than thirty (30) days after the end of the month in which the Seller issues to the Buyer an aggregated statement of Sales Invoices (the "**Trade Account Statement**") or such other date for payment as the Seller and the Buyer agree in writing.
- (d) The Seller must be notified of any complaint by the Buyer relating to an alleged discrepancy with a transaction recorded on the Buyer's Sales Invoice or Trade Account Statement, within fourteen (14) days of issue of such document. This time period for notification is necessary to allow the Seller an opportunity to investigate such complaints or alleged discrepancies reasonably contemporaneously, with access to its available materials and systems. Failure to notify the Seller of such discrepancy will result in the transactions recorded in the Sales Invoice or Trade Account Statement being taken to be *prima facie* correct, unless proven otherwise by the Buyer. If part of the amount set out in either of these documents is in dispute, the Buyer must nevertheless pay the remaining undisputed amount in accordance with the terms provided in this clause.
- (e) A party (the **First Party**) may set off any amount owed by the other party (the **Second Party**) or any of the Second Party's Related Bodies Corporate or Associated Entities, against any amount of money owed, or which may become owing, by the First Party or any of its Related Bodies Corporate or Associated Entities to the Second Party.
- (f) It is the Seller's preference that payments are made via EFT or BPay. Payments made by credit card may be subject to a surcharge (at cost).

## **7. INTEREST**

- (a) Without prejudice to any of its other accrued or contingent rights, the Seller may in its discretion charge interest on any amount owing to the Seller by the Buyer under these Terms and Conditions ("**Overdue Amount**").
- (b) This interest on Overdue Amounts will be charged at a rate of 16.8% per annum, calculated daily, on and from the date the Overdue Amount became due, up to the date of payment.
- (c) All payments made by the Buyer in relation to an Overdue Amount will first be applied to any interest accrued.
- (d) For the avoidance of doubt, this clause 7 does not apply to the extent that the Buyer has notified the Seller, under clause 6(d), of a genuinely disputed Sales Invoice or Trade Account Statement.

## **8. DELIVERY, OWNERSHIP AND RISK**

- (a) Dates and times quoted by Seller for delivery of Goods and performance of Services are estimates only. Because in many cases the Seller procures Goods from other suppliers and jurisdictions, and given the real prospect for delays in the (domestic and international) supply chain generally, the times estimated by the Seller (including "maximum lengths") for product deliveries may vary and delivery of such will be notified by the Seller on a case by case basis. For these reasons, any date or time named, accepted or provided by the Seller for delivery, completion, dispatch, shipment or arrival of the Goods and or performance of Services is an estimate only and does not constitute a representation or warranty that the Goods will be available or Services provided at that time.
- (b) Because of operational and space constraints at the Sellers' premises, Goods ordered for collection will only be held for a maximum period of ten (10) Business Days after the specific collection date agreed between the parties. If, following reasonable notification by the Seller, the Goods are not collected by that agreed time, the Goods may be delivered (at the Seller's option) to the Buyer's site, store, property, farm (if those details have been made known to the Seller by the Buyer) or to a store selected by the Seller, and all costs incurred by the Seller in relation to the holding and delivery of the Goods shall be charged to and be paid by the Buyer, and the Buyer shall bear all risk of Loss arising in connection with such Goods (except to the extent that such action was required because of any negligent act or omission of the Seller).
- (c) There is no obligation on the Seller to deliver an Order in one delivery and, for operational reasons, the Seller expressly reserves the right to deliver the Goods by instalments. Where the Seller delivers Goods by instalments, each instalment shall be deemed to be sold to the Buyer under a separate Order (notwithstanding that a single Order was placed by the Buyer). Failure by the Seller to deliver any one instalment by the time estimated for delivery of that instalment (if any) shall not entitle the Buyer to cancel that, or the balance of, the Order.
- (d) The Goods are at the Buyer's risk from the time at which they are delivered to the Buyer or to the Buyer's nominee, regardless of whether the Buyer has made payment in respect of those Goods.
- (e) The Buyer shall notify the Seller within seven (7) days of delivery of the Goods of any shortfall or Loss in respect of the Goods. This procedure is necessary to allow the Seller to assess whether it is responsible

for any such shortfall or Loss (as the Goods can be lost or damaged due to a variety of events or circumstances after delivery, including but not limited to conduct of third parties, the manner in which they are stored or handled, or other events unrelated to the Seller), and to allow the Seller to mitigate the potential for any future shortfall or Loss or other operational issues. Subject to the ACL, failure to notify the Seller within this seven (7) day period will disentitle the Buyer to any remedy in respect of the shortfall or Loss. For the avoidance of doubt, if the Buyer is a "consumer" under the ACL, nothing in this sub-clause limits any remedy available for a failure of the consumer guarantees in the ACL.

- (f) The Buyer understands that some of the Goods provided by the Seller may be dangerous and may contain hazardous chemicals. The Buyer agrees that it is the Buyer's responsibility to exercise caution when using and storing such Goods. The Buyer should visit the Safe Work Australia website for more information about chemicals <https://www.safeworkaustralia.gov.au/safety-topic/hazards/chemicals/hazardous-chemicals>.
- (g) Where the Seller or its transport contractor enters the Buyer's premises or the premises of a third party nominated by the Buyer as a delivery point, the Buyer:
  - i. releases the Seller from any claim the Buyer may at any time have against the Seller but for this release in respect of damage occasioned to the Buyer's premises or injury to persons arising out of the delivery by the Seller or its transport contractor of Goods to such premises; and
  - ii. indemnifies and holds the Seller harmless from and against any Loss suffered or incurred by the Seller in respect of damage occasioned to the third party's premises or injury to persons arising out of the delivery by the Seller or its transport contractor of Goods to the premises of the third party, except for and to the extent that such Loss suffered or incurred by the Seller arises out of the negligence or wilful misconduct of the Seller or its transport contractor.
- (h) Any Goods returned seven (7) or more days after their original purchase invoice date will be subject to a 10% restocking fee. The Seller will not under any circumstances accept Goods for return that have been specifically produced, imported or acquired to fulfil the Buyer's specifications, have been altered in any way, have been used or are not in their original condition. If the Buyer is a "consumer" under the ACL, nothing in this sub-clause limits any remedy available for a failure of the consumer guarantees in the ACL.

## 9. CONDITIONS AND WARRANTIES

- (a) The Buyer acknowledges and agrees that it has:
  - i. satisfied itself that the Goods or Services are suitable for the Buyer's purposes; and
  - ii. not entered into these Terms and Conditions in reliance upon any warranty or representation given by the Seller in relation to the Goods or the Services (other than as specified in these Terms and Conditions).
- (b) The ACL provides certain consumer warranties, guarantees or remedies in relation to the supply of Goods and provision of Services which cannot be modified nor excluded by contract. To the extent they apply, these Terms and Conditions do not purport to modify or exclude them.
- (c) Except as expressly set out in these Terms and Conditions, or as may otherwise be required by law, the Seller makes no warranty, representation or other statement in respect of the Goods or Services, their quality or their fitness for any purpose.
- (d) Subject to clause 15, where any Goods are manufactured by the Seller, the Seller warrants that those Goods will, for a period of twelve (12) months from the date of dispatch of the Goods, be free of faulty workmanship, materials or design. Because the Seller requires an opportunity to assess whether it is responsible for any faulty workmanship, materials or design of the Goods (in circumstances where any such default may have been caused by another party for which the Seller is not liable, or by the Buyer or its servants or agents), the Buyer will only be entitled to rely on such warranty if:
  - i. the Seller is provided with written notice within thirty (30) days of occurrence of the circumstances giving rise to a claim for breach of that warranty; and
  - ii. the Seller is permitted to inspect the affected Goods; and
  - iii. the Buyer returns the affected Goods or components to the Seller's premises; and
  - iv. the Seller is satisfied, by its own examination of the affected Goods and acting reasonably, that any alleged circumstances giving rise to the claim have not been caused by:
    - 1. improper use, installation, operation, damage due to accident, neglect, lightning power surge, or from improper repair, alteration, modification or adjustment to the affected Goods; or
    - 2. unusual deterioration or degradation due to physical, electrical, electromagnetic or noise environments.
- (e) Any repairs, alterations or other work carried out to the Goods by a person other than an authorised

representative of the Seller shall invalidate the warranty in paragraph (d) of this clause.

## **10. SERVICES**

The Seller may provide Services to the Buyer from time to time either standalone or in conjunction with the sale of Goods. Because the Services are entirely contingent on the specific Goods being acquired by the Buyer or on the Buyer's circumstances or specific factual details (as conveyed by the Buyer), and despite the fact that the Seller will exercise reasonable care in the performance of the Services, the Seller shall have no liability or responsibility to any third party or any person other than the Buyer, as a consequence of any reliance upon advice given as part of the Services.

## **11. LIABILITY AND INDEMNITY**

(a) If the Buyer is a consumer for the purposes of the ACL then, for major failures with the Goods, the Buyer is entitled to a replacement or a refund. The Buyer is also entitled to have Goods repaired or replaced if the Goods fail to be of acceptable quality and the failure does not amount to a major failure. For major failures with the Goods and Services, the Buyer is entitled:

- to cancel the Buyer's contract with the Seller; and
- to a refund for the unused portion, or to compensation for its reduced value.

If a failure with the Goods or a Service does not amount to a major failure, the Buyer is entitled to have the failure rectified in a reasonable time. If this is not done, the Buyer is entitled to a refund for the Goods and to cancel the contract for the Service and obtain a refund of any unused portion. The Buyer is also entitled to be compensated for any other reasonably foreseeable loss or damage.

(b) Notwithstanding clause 11(a), to the extent permitted by the ACL and by law generally, any liability of the Seller for any Loss arising out of or in connection with these Terms and Conditions or the supply of Goods and/or the provision of Services, will be limited to the extent the Loss was caused directly by the Seller, and in any one case be limited (at the Seller's option, acting reasonably) either to replacement or repair of the relevant Goods under the relevant Order or reimbursement of the Buyer for any replacement or repair of those Goods, and (again, at the Seller's option, acting reasonably) either re-supplying the relevant Services under the relevant Order or reimbursing the Buyer for paying someone else to supply those Services.

(c) If the Buyer requests or insists that warranty service in paragraph (b) of this clause be carried out on site or at the Buyer's premises, then any costs over and above the direct costs of replacing or repairing the Goods or the component parts of the Goods at the Buyer's premises shall be at the Buyer's expense.

(d) To the extent permitted by law, every exemption, exclusion or limitation in these Terms and Conditions applicable to the Seller or to which the Seller is entitled (under these Terms and Conditions or otherwise) shall also be available and shall extend to protect:

- all of the Seller's personnel; and
- all persons who are or might be vicariously liable for the acts or omissions of any such person, and for the purposes of this clause, the Seller is acting as an agent on behalf of and for the benefit of all such persons and each of them shall to this extent be deemed to be parties to these Terms and Conditions.

(e) Except where the Loss is reasonably attributable to an act or omission of the Seller, the Buyer indemnifies the Seller and shall keep the Seller indemnified against any Loss suffered or incurred by the Seller or any of its Related Bodies Corporate as a result of:

- any breach of these Terms and Conditions by the Buyer;
- any negligence by or on behalf of the Buyer; or
- the Buyer not using the Goods in accordance with guidelines, specifications or recommendations provided by the Seller or by any manufacturer of the Goods.

(f) To the extent permitted by law, neither party is liable to the other party for any Claims arising out of these Terms and Conditions or any contract, for any Consequential Loss, including Claims for breach of contract, in negligence or in tort, or for any other common law or statutory action, provided that nothing in this clause relieves the Buyer from its obligation to pay the Buyer pursuant to these Terms and Conditions.

## **12. RETENTION OF TITLE**

(a) Title to the Goods the subject of an Order remains with the Seller, and does not pass to the Buyer, until the Seller receives full payment in cleared funds from the Buyer, for those Goods and all other amounts

owing by the Buyer to the Seller.

- (b) Prior to title in the Goods passing to the Buyer, the Buyer:
- i. must hold the Goods as bailee and fiduciary agent of the Seller (and the Seller is entitled to all rights and remedies of a bailor);
  - ii. where the Buyer processes the Goods, either by using the Goods to manufacture, grow, sow or raise other goods, Crops or Livestock or by incorporating the Goods in or with any other goods, the Buyer must hold such part of the new goods ("**Processed Goods**") on trust for the Seller as bailee and fiduciary agent of the Seller;
  - iii. must store the Goods and such part of the Processed Goods separate from its own goods and those of any other third party so that they are readily identifiable as the property of the Seller;
  - iv. must keep the Goods in good and merchantable condition and fully insure the Goods against any Loss however caused;
  - v. must not sell the Goods or such part of the Processed Goods except with the prior written consent of the Seller or in the ordinary course of the Buyer's business, provided that any such sale is at arms' length and on market terms;
  - vi. must keep any proceeds of re-sale, insofar as they relate to the Goods, and such proceeds shall be held on trust for the Seller in a separate account; and
  - vii. must not create any encumbrance over the Goods which is inconsistent with the Seller's title and ownership of the Goods, including a security interest in favour of any third party on the PPSR.
- (c) For the purpose of this clause 12, "such part" means an amount equal in dollar terms to the amount owing by the Buyer to the Seller at the time the Goods are used in the manufacture of, or incorporated into, the Processed Goods.
- (d) If the Buyer is in breach of these Terms and Conditions including, without limitation, failure by the Buyer to make payment for the Goods by the date specified by the Seller to the Buyer or in the Seller's reasonable opinion the payment of any amount in respect of the Goods supplied by the Seller is in jeopardy, the Buyer must return the Goods to the Seller immediately on demand.
- (e) If the Buyer does not return the Goods to the Seller on demand under clause 12(d), and in addition to the Seller's rights under the PPSA, the Seller or its nominees may enter upon any premises where the Goods are located to take possession of the Goods without prior notice, and the Buyer indemnifies the Seller for all Loss, fees (including legal fees on a full indemnity basis) incurred or suffered as a result of any and all prosecution, actions, demands, claims or proceedings brought by or against the Seller in connection with the retaking of possession of the Goods or the exercise by the Seller of its rights under this clause, and the Buyer shall repay all such fees, Losses, or any other sums of money on demand.
- (f) In the event that the Goods are dissipated, commingled, or used by the Buyer to allow for any Crop or Livestock to be sown, raised or grown, the Seller will maintain a Security Interest in those Goods that subsequently become part of the Crop or Livestock, pursuant to Part 3.4 of Chapter 3 of the PPSA and further, the Seller may register a Security Interest on the PPS Register over any and all Crops and/or Livestock in which the Goods are applied in order to secure payment of the Moneys owing by the Buyer to the Seller for the Goods.
- (g) The Buyer and Seller agree that the provisions of this clause apply despite any Credit Agreement between the parties under which the Seller grants a line of credit to the Buyer and the provisions of this clause 12 are incorporated into any such Credit Agreement.

### 13. PPSA

- (a) Subject to the terms of these Terms and Conditions, the terms "**Collateral**", "**Debtor**", "**Financing Change Statement**", "**Financing Statement**", "**Grantor**", "**Proceeds**", "**Secured Party**", "**Security Agreement**" and "**Security Interest**" have the meanings given in the PPSA.
- (b) The Buyer acknowledges and agrees that these Terms and Conditions constitute a Security Agreement for the purposes of section 20 of the PPSA and that value has been given for the Security Interest pursuant to section 19 of the PPSA.
- (c) The Buyer further acknowledges that:
- i. the Seller holds (as "Secured Party") a Security Interest over all of the present and after acquired Goods supplied by the Seller to the Buyer and any Proceeds of the sale of those Goods ("Collateral") and a single registration on the PPS Register will cover all present and after acquired Goods;
  - ii. any purchase by the Buyer on credit terms from the Seller pursuant to any Credit Agreement, or any retention of title applies pursuant to clause 12 hereof will constitute a PMSI;
  - iii. the PMSI granted herein will continue to apply to any and all Goods coming into existence or



Proceeds of sale of Goods coming into existence;

- iv. the Seller will continue to hold a Security Interest in the Goods in accordance with and subject to the PPSA, notwithstanding that the Goods may be processed, commingled or become an accession with other goods;
  - v. any Security Interest of the Seller will be a continuing and subsisting interest in the Collateral with priority to the fullest extent permitted by law over all registered or unregistered Security Interests;
  - vi. until title in the Goods passes to the Buyer, the Buyer will keep all Goods free, and ensure all such Goods are kept free, of any charge, lien or Security Interest and not otherwise deal with the Goods in a way that will or may prejudice any rights of the Seller under these Terms and Conditions, the PPSA, or any other document that the Seller may require the Buyer to enter into for the purposes of securing the Seller's Security Interest in the Goods; and
  - vii. in addition to any other rights under these Terms and Conditions or otherwise arising, the Seller may exercise any and all remedies afforded to it as a Secured Party under Chapter 4 of the PPSA including, without limitation, entry into any building, premises, farm or Crop owned, occupied, used, leased or share-farmed by the Buyer, to search for, inspect, seize, dispose of or retain those Goods, Crops or Livestock in respect to which the Buyer has granted a Security Interest to the Seller.
- (d) The Buyer undertakes to:
- i. sign any further documents and provide such information which the Seller may reasonably require to register, amend or update a Financing Statement or Financing Change Statement in relation to a Security Interest on the PPS Register;
  - ii. indemnify and upon demand reimburse the Seller for all expenses incurred in registering a Financing Statement or Financing Change Statement on the PPS Register or releasing any Security Interests;
  - iii. maintain, at its own expense, all appropriate policies of insurance for all damage to the Goods, Crops and/or Livestock in an amount not less than the market value of the Goods, Crops and/or Livestock;
  - iv. not register or permit to be registered a Financing Change Statement in the Collateral without the prior written consent of the Seller; and
  - v. provide the Seller not less than seven (7) days prior written notice of any proposed change in the Buyer's name, address, contact numbers, business practice or such other change in the Buyer's details registered on the PPS Register to enable the Seller to register a Financing Change Statement if required.
- (e) The Buyer hereby agrees to sign any further documentation, including but not limited to, any payment direction, priority agreement or security deed for the purposes of securing payment of any secured Moneys or Moneys to the Seller and further, agrees to provide to any Third Party Purchaser a copy of the documentation for the purposes of securing payment of any secured Moneys to the Seller.
- (f) In consideration for the Seller providing Goods to the Buyer on credit terms, the Seller may require the Buyer to obtain and maintain a policy of insurance over the Goods, Crops and/or Livestock (or any Processed Goods), noting the interests of the Seller in such Goods, Crops and/or Livestock (or any Processed Goods), and on terms and conditions that the Seller deems necessary to protect itself from any material diminution in the Goods, Crops and/or Livestock (or any Processed Goods), whether or not the material diminution is a result of the acts, omissions or negligence of the Buyer.
- (g) The Seller and the Buyer agree that sections 96, 125 and 132 of the PPSA do not apply to the security agreement created under these Terms and Conditions.
- (h) By accepting these Terms and Conditions, the Buyer hereby waives its rights to receive notices under sections 95, 118, 121, 130, 132 and 135 of the PPSA.
- (i) The Buyer waives its rights as a Grantor and/or a Debtor under sections 142 and 143 of the PPSA.
- (j) The Buyer waives its right to receive a verification statement in accordance with section 157 of the PPSA.
- (k) The Buyer shall unconditionally ratify any actions taken by the Seller under this clause 13.
- (l) This clause 13 will survive the termination of these Terms and Conditions to the extent permitted by law.

#### **14. EVENT OF DEFAULT**

- (a) If there is an Event of Default, the Seller will be entitled to exercise its rights under these Terms and Conditions in addition to those rights at law and equity.
- (b) Without limiting any matters at law, equity, or under these Terms and Conditions, the following matters are deemed as Events of Default:
  - i. the Buyer fails to pay (or repay) Moneys by the due date, in accordance with these Terms and Conditions, the Credit Agreement, or any other written demand provided by the Seller to the Buyer requiring payment of the Moneys;

- ii. the Buyer is in breach of any of the Buyer's obligations under these Terms and Conditions;
  - iii. a representation, warranty or statement by or on behalf of the Buyer in any agreement entered into between the parties is not true in a material respect or is misleading in a material respect when made or repeated;
  - iv. the Buyer becomes Insolvent;
  - v. Collateral or Goods is or will be able to be transferred (including by sale or creating a Security Interest or under proceedings to enforce a judgment) in breach of a provision in these Terms and Conditions prohibiting that transfer;
  - vi. the Buyer does not comply with its obligations under any priority agreement or payment direction entered into in accordance with these Terms and Conditions;
  - vii. the Buyer fails to maintain the appropriate policy of insurance over the Crops and/or Livestock, including any policy of insurance maintained or to be maintained in the name of the Seller;
  - viii. if the Buyer is a partnership and without prior notification to the Seller, the constitution of the partnership is changed, or the partnership is dissolved;
  - ix. in the case of a Security Interest that the Seller has over the Crops:
    - 1. The Crops suffer a material diminution in value or utility, or a material part of the Crops suffers total loss or destruction or damage other than by Event of Force Majeure; or
    - 2. Crops are taken out of the effective management or control of the Buyer whether or not within the control of any party; and
  - x. In the case of a Security Interest that the Seller has over the Livestock:
    - 1. The Livestock suffer a material diminution in value or utility, or the Livestock become deceased, ill or malnourished as a result of the Buyer's or an agent of the Buyer's conduct; or
    - 2. The Livestock are taken out of the effective management or control of the Buyer whether or not within the control of any party.
- (c) Where the Buyer suffers an Event of Default or is otherwise in default in the performance of any of its material obligations under these Terms and Conditions then without prejudice to any other rights it may have under these Terms and Conditions or at law, the Seller may:
- i. refuse to supply or deliver further Goods to the Buyer until such time as the Buyer has remedied that default (in accordance with, and within the period set out in, clause 17(a)); and/or
  - ii. on the provision of written notice by the Seller to the Buyer, terminate these Terms and Conditions, the Credit Agreement (pursuant to the terms of that Credit Agreement) or any other agreement between the parties.
- (d) For the avoidance of doubt, if the Buyer is Insolvent, this is deemed to be an Event of Default and will immediately allow for the Seller, in its absolute discretion, to exercise any and all of its rights of enforcement pursuant to Chapter 4 of the PPSA as well as those rights pursuant to these Terms and Conditions over the Goods, Crops and/or Livestock as the case may be.
- (e) If the Buyer is Insolvent, the Seller may in its discretion exercise any or all of the following rights in addition to any other rights it may have under these Terms and Conditions, at law, or in equity, immediately:
- i. suspend deliveries of further Goods to the Buyer whether under these Terms and Conditions or otherwise;
  - ii. terminate the Credit Agreement, in line with the terms of that Credit Agreement, in relation to Goods that have not been delivered;
  - iii. in line with the terms of that Credit Agreement, withdraw any credit facilities which may have been extended to the Buyer and require immediate payment of all Moneys owed to the Seller by the Buyer;
  - iv. terminate any Credit Agreement, pursuant to the terms of that Credit Agreement; and
  - v. issue an invoice for, and demand immediate payment of, Goods ordered by the Buyer but not delivered.
- (f) All costs incurred by the Seller relating to any action taken by the Seller to recover Moneys due from the Buyer (including, without limitation, legal or other debt collection costs) shall be payable by the Buyer on demand.

## 15. MANUFACTURERS' CHANGES

- (a) In the provision of Goods to the Buyer, the Seller will be acting as the mere agent of the manufacturer or supplier of those Goods, unless specified otherwise in writing. The Buyer acknowledges and agrees that it is not possible or reasonable for the Seller to be disclosing its agency status in that regard, in respect of each Order, and that to the extent that the Seller acts as mere agent, the Seller does not make or

purport to make any contract with the Buyer for the sale or provision of the Goods and acts solely on behalf of the third party manufacturers or suppliers by establishing contracts with the Buyer so that direct contractual relationships are established between the Buyer and such third parties.

- (b) Manufacturers of the Goods provided by the Seller may vary from time to time. All information contained in, on or with the manufacturer's Goods is believed to be reliable. Despite this, the Seller cannot guarantee its accuracy and the Buyer should rely upon their own enquiries.
- (c) Where the Seller is acting as a mere agent of a manufacturer or supplier, , the Seller shall not be liable for any alteration, variation, representation, guarantee, condition or warranty in the Goods made by the manufacturer or the supplier.

#### **16. FORCE MAJEURE**

- (a) Neither party shall be under any liability whatsoever (except in relation to the Buyer's obligation to make payments under these Terms and Conditions or any Credit Agreement) for the consequences of any failure to perform or delay in performing any of its obligations under these Terms and Conditions when due, whilst and to the extent that such failure or delay is due directly to any Event of Force Majeure.
- (b) Without limiting the generality of the foregoing, this includes any liability whatsoever for any delay in completion, delivery, despatch, shipment or arrival of the Goods or in the tender of any documents or the like.
- (c) If there is an Event of Force Majeure, the party invoking this clause must notify the other of the event and the likely impact on its performance under these Terms and Conditions. If the Event of Force Majeure continues for a period longer than 90 days from its initial occurrence, then either party may terminate the Terms and Conditions without any liability whatsoever on its part arising from such termination.

#### **17. TERMINATION**

- (a) The Seller reserves the right to terminate the application of these Terms and Conditions, any account, Order, Fee For Service, or other agreement:
  - i. if the Seller has provided one month's notice of termination; or
  - ii. immediately, if the Buyer suffers an Event of Default and:
    - 1. the breach is incapable of remedy; or
    - 2. the breach is capable of remedy and, unless paragraph (iii) applies:
      - A. the Seller has given notice specifying the breach and requesting that it be remedied; and
      - B. the Buyer has failed to remedy that breach within fourteen (14) days of receiving the notice.
  - iii. immediately, if the Buyer:
    - 1. in the reasonable opinion of the Seller has acted fraudulently or dishonestly or with malicious purpose; or
    - 2. has engaged in criminal activity or undertaken actions prohibited by law.
- (b) The termination of these Terms and Conditions, any account, Order, Fee for Service or other agreement for any reason does not affect any accrued rights or remedies of either party set out in these Terms and Conditions.

#### **18. CONFIDENTIALITY**

- (a) Except as required by law and these Terms and Conditions, and subject to the PPSA, the Seller and the Buyer agree to treat these Terms and Conditions as confidential.
- (b) The Seller and the Buyer acknowledge and agree that this clause constitutes a confidentiality agreement pursuant to section 275(6) of the PPSA.
- (c) Neither the Seller nor the Buyer will disclose, send or make available any of the information referred to in section 275(1) of the PPSA to any person except as required by law, these terms and conditions and subject to the PPSA.

#### **19. GST**

If the Seller has any liability to pay GST on the supply of any Goods or Services to the Buyer, the Buyer must pay the Seller an amount equivalent to the GST liability of the Seller at the same time as the principal is paid for the Goods.

#### **20. TRUSTS**

- (a) If the buyer is a trustee of the trust, the trustee acknowledges that these Terms and Conditions are

binding on it personally and in its capacity as trustee of the trust.

- (b) The trustee expressly acknowledges that the trustee has full power conferred by the relevant trust deed or any law:
  - i. to execute and perform this Agreement, so as to bind the trust and its assets, without any default by that trustee under the trust deed or any law;
  - ii. to perform any action or liability contemplated by these Terms and Conditions;
  - iii. to perform any business activity of the trust as performed or contemplated at any time; and
  - iv. to pledge the assets of the trust.
- (c) The trustee or trustees (both in its own right and as trustee of the trust) represents and warrants to the Seller that:
  - i. the trust is validly constituted and has not terminated, nor has any action been taken to wind up, terminate or resettlement the trust, nor has the date or any event occurred for the vesting of the assets of the trust ("**Trust Fund**");
  - ii. it has not given any notice of resignation and no action has been taken to remove it or to appoint an additional trustee or trustee of the trust;
  - iii. all action has been taken that is necessary or desirable under the trust deed or at law to authorise its entry into these Terms and Conditions and to perform its obligations under these Terms and Conditions;
  - iv. it is entering into these Terms and Conditions as part of the proper administration of the trust, for the commercial benefit of the trust and for the benefit of the beneficiaries of the trust;
  - v. (**Indemnities**):
    - 1. It has the right to be indemnified out of the Trust Fund in relation to any liability arising under or in connection with the proper performance of its rights and obligations under these Terms and Conditions;
    - 2. The Trust Fund is sufficient to satisfy that right in full; and
    - 3. It has not released or disposed of its equitable lien over the Trust Fund;
  - vi. It has disclosed to the Seller full particulars of the trust and of any other trust or fiduciary relationship affecting the Trust Fund and has given the Seller a complete up-to-date copy of the trust deed; and
  - vii. It is not in breach of any material obligation imposed on it in its capacity as trustee of the trust, whether under the trust deed or otherwise.
- (d) The warranties in this clause are taken to be made on receipt of these Terms and Conditions.
- (e) The trustee must give the Seller promptly on request (and in any event within ten (10) days of receipt of the request) either:
  - i. any information relating to the financial condition (including the Accounts), business, assets and affairs of the trust that the Seller reasonably requests; or
  - ii. a statement from the duly appointed auditors of the trust attesting to the solvency and financial soundness of the trust and the trustee of the trust.

## **21. INTELLECTUAL PROPERTY RIGHTS**

- (a) Nothing in these Terms and Conditions purports to grant to the Buyer any time, a license to use the Seller's Intellectual Property.
- (b) The Buyer acknowledges that it has no rights in or to the Seller's Intellectual Property.
- (c) The Buyer will not seek to register, in Australia or elsewhere, any Intellectual Property Rights including trade marks, or business and company names that may be conceived as being the same as, or deceptively similar to any trade mark, brand or business and company name of the Seller.
- (d) The Buyer will, at the request of the Seller, do all things necessary to enforce the Buyer's compliance with this clause.

## **22. ENFORCEMENT COSTS**

- (a) In the event that the Buyer breaches any of the terms and conditions in these Terms and Conditions, the Buyer will be required to pay any Loss incurred by the Seller in enforcing or preserving its rights under these Terms and Conditions. This includes costs incurred by the Seller in preserving or maintaining property secured, collection expenses and expenses resulting from enforcement under the PPSA.
- (b) Only the net proceeds of any enforcement of security and/or resultant recovery or receipt of monies will be applied to any amounts and Moneys owed by the Buyer. For the avoidance of doubt, the net proceeds of enforcement is to be exclusive of any GST, taxes, duties, fees or fines payable.

## **23. INCONSISTENCY**

Unless expressed to the contrary in any other contract between the parties, in the event of any inconsistency between these Terms and Conditions and any specific terms contained in any other contract between the parties, the specific terms contained in these Terms and Conditions will prevail to the extent of that inconsistency.

## **24. SEVERABILITY**

Any provision in these Terms and Conditions which is invalid or unenforceable in any jurisdiction is to be read down for the purpose of that jurisdiction, if possible, so as to be valid and enforceable, and otherwise must be severed to the extent of the invalidity or unenforceability, without affecting the remaining provisions of this agreement or affecting the validity or enforceability of that provision in any other jurisdiction.

## **25. WAIVER**

Waiver of any right, power, authority, discretion or remedy arising on a breach of or default under an agreement in force between the Seller and the Buyer on these Terms and Conditions must be in writing and signed by the party granting the waiver.

## **26. NOTICES**

(a) Any notice given under this Agreement:

- i. must be in writing and signed by a person duly authorised by the sender;
- ii. must be delivered to the intended recipient by prepaid post or by hand or fax or email to the address or fax number or email address last notified by the intended recipient to the sender; and
- iii. will be taken to have been duly given:
  1. in the case of delivery in person, when delivered;
  2. in the case of delivery by post, two (2) Business Days after the date of posting or seven (7) Business Days after the date of posting if posted to an address in another country; and
  3. in the case of email, when sent, unless the sender receives a delivery failure notification indicating that the email has not been delivered to the addressee,

but if delivery or receipt would be taken to occur on a day when business is not generally carried on in the place to which the notice is sent, or is later than 4:00pm (local time), it will be taken to have been duly given at the commencement of business on the next day when business is generally carried on in that place.

## **27. ASSIGNMENT**

Neither party may assign or otherwise purport to transfer its rights or obligations under these Terms and Conditions to any other person without the prior written consent of the other party (which consent must not be unreasonably withheld).

## **28. CREDIT AGREEMENT**

Where the Buyer has entered into a Credit Agreement with the Seller, the terms and conditions of that Credit Agreement are incorporated by reference into these Terms and Conditions. Both documents are legally binding between the Buyer and Seller and should be read together. To the extent of any inconsistency, these Terms and Conditions prevail over the Credit Agreement terms and conditions.

## **29. GOVERNING LAW**

These Terms and Conditions are governed by the laws of New South Wales. The parties submit to the non-exclusive jurisdiction of the courts of that State.