

Marco Polo Foods Pty Ltd – Terms & Conditions of Trade

- 1. Definitions**
- 1.1 "Marco" means Marco Polo Foods Pty Ltd, its successors and assigns or any person acting on behalf of and with the authority of Marco Polo Foods Pty Ltd.
- 1.2 "Customer" means the person buying the Goods as specified in any invoice, document or order, and if there is more than one Customer is a reference to each Customer jointly and severally.
- 1.3 "Goods" means all Goods or Services supplied by Marco to the Customer at the Customer's request from time to time (where the context so permits the terms "Goods" or "Services" shall be interchangeable for the other).
- 1.4 "Price" means the Price payable (plus any GST where applicable) for the Goods as agreed between Marco and the Customer in accordance with clause 5 below.
- 1.5 "GST" means Goods and Services Tax (GST) as defined within the "A New Tax System (Goods and Services Tax) Act 1999" (Cth).
- 2. Acceptance**
- 2.1 The Customer is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Customer places an order for or accepts delivery of the Goods.
- 2.2 These terms and conditions may only be amended with the consent of both parties in writing, and shall prevail to the extent of any inconsistency with any other document or agreement between the Customer and Marco.
- 2.3 The Customer acknowledges that the supply of Goods on credit shall not take effect until the Customer has completed a credit application with Marco and it has been approved with a credit limit established for the account.
- 2.4 In the event that the supply of Goods exceeds the Customer's credit limit and/or the account exceeds the payment terms, Marco reserves the right to refuse delivery.
- 2.5 The Customer acknowledges and accepts that the supply of Goods for accepted orders may be subject to availability and if, for any reason, Goods are not or cease to be available, Marco reserves the right to vary the Price with alternative Goods as per clause 5.2.
- 2.6 Notwithstanding clause 2.5 Marco also reserves the right at their discretion to introduce additional new Goods as part of the Goods to be supplied.
- 3. Electronic Transactions Act 2000**
- 3.1 Electronic signatures shall be deemed to be accepted by either party providing that the parties have complied with Section 9 of the Electronic Transactions Act 2000 or any other applicable provisions of that Act or any Regulations referred to in that Act.
- 4. Change in Control**
- 4.1 The Customer shall give Marco not less than fourteen (14) days prior written notice of any proposed change of ownership of the Customer and/or any other change in the Customer's details (including but not limited to, changes in the Customer's name, address, contact phone or fax numbers, or business practice). The Customer shall be liable for any loss incurred by Marco as a result of the Customer's failure to comply with this clause.
- 5. Price and Payment**
- 5.1 At Marco's sole discretion, the Price shall be either:
- as indicated on any invoice provided by Marco to the Customer; or
 - the Price as at the date of delivery of the Goods according to Marco's current price list; or
 - Marco's quoted price (subject to clause 5.2) which will be valid for the period stated in the quotation or otherwise for a period of thirty (30) days.
- 5.2 Marco reserves the right to change the Price in the event of a variation to Marco's quotation. Any variation from the plan of scheduled Services or specifications (including, but not limited to, in the event that overseas transactions increase as a consequence of variations in foreign currency rates of exchange and/or international freight and insurance charges or as a result of increases to Marco in the cost of the Goods) will be detailed in writing and charged for on the basis of Marco's quotation and will be shown as variations on the invoice. Payment for all variations must be made in full at their time of completion.
- 5.3 At Marco's sole discretion, a deposit may be required.
- 5.4 Time for payment for the Goods being of the essence, the Price will be payable by the Customer on the date/s determined by Marco, which may be:
- on delivery of the Goods;
 - the date specified on any invoice or other form as being the date for payment; or
 - in any other written contract, the date which is thirty (30) days following the date of any invoice given to the Customer by Marco.
- 5.5 Payment may be made by cash, cheque, bank cheque, electronic-line banking, or by any other method as agreed to between the Customer and Marco.
- 5.6 The Customer shall not be entitled to set off against, or deduct from the Price, any amount due to Marco from any other agreement or any other amounts, or any invoice because part of that invoice is in dispute.
- 5.7 Unless otherwise stated the Price does not include GST. In addition to the Price the Customer must pay to Marco an amount equal to any GST Marco must pay for any supply by Marco under this or any other agreement for the sale of the Goods. The Customer must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Customer pays the Price. In addition, the Customer must pay any other taxes and duties that may be applicable in addition to the Price except where they are expressly included in the Price.
- 6. Delivery of Goods**
- 6.1 Delivery ("Delivery") of the Goods is taken to occur at the time that:
- the Customer or the Customer's nominated carrier takes possession of the Goods at Marco's address; or
 - Marco (or Marco's nominated carrier) delivers the Goods to the Customer's nominated address even if the Customer is not present at the address.
- 6.2 At Marco's sole discretion, the costs of delivery are:
- included in the Price for local area deliveries; or
 - in addition to the Price (and where, applicable charged to the Customer's account) for regional area deliveries.
- 6.3 Any time specified by Marco for delivery of the Goods is an estimate only and Marco will not be liable for any loss or damage incurred by the Customer as a result of delivery being late. However, both parties agree that they shall make every endeavour to enable the Goods to be delivered at the time and place as was arranged between both parties. In the event that Marco is unable to supply the Goods as agreed solely due to any action or inaction of the Customer, then Marco shall be entitled to charge a reasonable fee for redelivery and/or storage.
- 7. Risk**
- 7.1 Risk of damage to or loss of the Goods passes to the Customer on Delivery and the Customer must insure the Goods on or before Delivery.
- 7.2 If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Customer, Marco is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by Marco is sufficient evidence of Marco's rights to receive the insurance proceeds without the need for any person dealing with Marco to make further enquiries.
- 7.3 If the Customer requests Marco to leave Goods outside Marco's premises for collection or to deliver the Goods to an unattended location, then such Goods shall be left at the Customer's sole risk.
- 8. Access**
- 8.1 The Customer shall ensure that Marco has clear and free access to the work site at all times to enable them to undertake the Services. Marco shall not be liable for any loss or damage to the site (including, without limitation, damage to pathways, driveways and concrete or paved or graded areas) unless due to the negligence of Marco.
- 9. Title**
- 9.1 Marco and the Customer agree that ownership of the Goods shall not pass until:
- the Customer has paid Marco all amounts owing to Marco; and
 - the Customer has met all of its other obligations to Marco.
- 9.2 Receipt by Marco of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised.
- 9.3 It is further agreed that, until ownership of the Goods passes to the Customer in accordance with clause 9.1:
- the Customer is only a bailee of the Goods and must return the Goods to Marco on request;
 - the Customer holds the benefit of the Customer's insurance of the Goods on trust for Marco and must pay to Marco the proceeds of any insurance in the event of the Goods being lost, damaged or destroyed;
 - the Customer must not sell, dispose, or otherwise part with possession of the Goods other than in the ordinary course of business and for market value. If the Customer sells, disposes or parts with possession of the Goods then the Customer must hold the proceeds of any such act on trust for Marco and must pay or deliver the proceeds to Marco on demand;
 - the Customer should not convert or process the Goods or intermix them with other goods but if the Customer does so then the Customer holds the resulting product on trust for the benefit of Marco and must sell, dispose of or return the resulting product to Marco as it so directs;
 - the Customer irrevocably authorises Marco to enter any premises where Marco believes the Goods are kept and recover possession of the Goods;
 - Marco may recover possession of any Goods in transit whether or not delivery has occurred;
 - the Customer shall not charge or grant an encumbrance over the Goods nor grant nor otherwise give away any interest in the Goods while they remain the property of Marco.
- (h) Marco may commence proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods has not passed to the Customer.
- 10. Personal Property Securities Act 2009 ("PPSA")**
- 10.1 In this clause financing statement, financing change statement, security agreement, and security interest has the meaning given to it by the PPSA.
- 10.2 Upon assenting to these terms and conditions in writing the Customer acknowledges and agrees to these terms and conditions constitute a security agreement for the purposes of the PPSA and creates a security interest in all Goods and/or collateral (account) – being a monetary obligation of the Customer to Marco for Services – that have previously been supplied and that will be supplied in the future by Marco to the Customer.
- 10.3 The Customer undertakes to:
- promptly sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which Marco may reasonably require to;
 - register a financing statement or financing change statement in relation to a security interest on the Personal Property Securities Register;
 - register any other document required to be registered by the PPSA; or
 - correct a defect in a statement referred to in clause 10.3(a)(i) or 10.3(a)(ii);
 - indemnify, and upon demand reimburse, Marco for all expenses incurred in registering a financing statement or financing change statement on the Personal Property Securities Register established by the PPSA or releasing any Goods charged thereby;
 - not register a financing change statement in respect of a security interest without the prior written consent of Marco;
 - not register, or permit to be registered, a financing statement or a financing change statement in relation to the Goods and/or collateral (account) in favour of a third party without the prior written consent of Marco;
 - immediately advise Marco of any material change in its business practices of selling the Goods which would result in a change in the nature of proceeds derived from such sales;
 - Marco and the Customer agree that sections 96, 115 and 125 of the PPSA do not apply to the security agreement created by these terms and conditions.
 - The Customer waives their rights to receive notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) of the PPSA.
 - The Customer waives their rights as a grantor and/or a debtor under sections 142 and 143 of the PPSA.
 - Unless otherwise agreed to in writing by Marco, the Customer waives their right to receive a verification statement in accordance with section 157 of the PPSA.
 - The Customer must unconditionally ratify any actions taken by Marco under clauses 10.3 to 10.5.
 - Subject to any express provisions to the contrary (including those contained in this clause 10) nothing in these terms and conditions is intended to have the effect of contracting out of any of the provisions of the PPSA.
- 11. Security and Charge**
- 11.1 In consideration of Marco agreeing to supply the Goods, the Customer charges all of its rights, title and interest (whether joint or several) in any land, realty or other assets capable of being charged, owned by the Customer either now or in the future, to secure the performance by the Customer of its obligations under these terms and conditions (including, but not limited to, the payment of any money).
- 11.2 The Customer indemnifies Marco from and against all Marco's costs and disbursements including legal costs on a solicitor and own client basis incurred in exercising Marco's rights under this clause.
- 11.3 The Customer irrevocably appoints Marco and each director of Marco as the Customer's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 11 including, but not limited to, signing any document on the Customer's behalf.
- 12. Defects, Warranties and Returns, Competition and Consumer Act 2010 (CCA)**
- 12.1 The Customer must inspect the Goods on delivery and must within forty-eight (48) hours of delivery notify Marco in writing of any evident defect/damage, shortage in quantity, or failure to comply with the description or quote. The Customer must notify any other alleged defect in the Goods as soon as reasonably possible after any such defect becomes evident. Upon such notification the Customer must allow Marco to inspect the Goods.
- 12.2 Under the State, Territory and Commonwealth Law (including, without limitation the CCA), certain statutory implied guarantees and warranties (including, without limitation the statutory guarantees under the CCA) may be implied into these terms and conditions (**Non-Excluded Guarantees**).
- 12.3 Marco acknowledges that nothing in these terms and conditions purports to modify or exclude the Non-Excluded Guarantees.
- 12.4 Except as expressly set out in these terms and conditions or in respect of the Non-Excluded Guarantees, Marco makes no warranties or other representations under these terms and conditions including but not limited to the quality or suitability of the Goods. Marco's liability in respect of these warranties is limited to the fullest extent permitted by law.
- 12.5 If the Customer is a consumer within the meaning of the CCA, Marco's liability is limited to the extent permitted by section 64A of Schedule 2.
- 12.6 If Marco is required to refund the Goods under this clause or the CCA, but is unable to do so, Marco may replace any money the Customer has paid for the Goods.
- 12.7 If the Customer is not a consumer within the meaning of the CCA, Marco's liability for any defect or damage in the Goods is:
- limited to the value of any express warranty or warranty card provided to the Customer by Marco at Marco's sole discretion;
 - limited to any warranty to which Marco is entitled, if Marco did not manufacture the Goods;
 - otherwise negated absolutely.
- 12.8 Subject to this clause 12, returns will only be accepted provided that:
- the Customer has complied with the provisions of clause 12.1; and
 - Marco has agreed that the Goods are defective; and
 - the Goods are returned within a reasonable time at the Customer's cost (if that cost is not significant); and
 - the Goods are returned in as close a condition to that in which they were delivered as is possible.
- 12.9 Notwithstanding clauses 12.1 to 12.8 but subject to the CCA, Marco shall not be liable for any defect or damage which may be caused or partly caused by or arise as a result of:
- the Customer failing to properly maintain or store any Goods;
 - the Customer using the Goods for any purpose other than that for which they were designed;
 - the Customer continuing the use of any Goods after any defect became apparent or should have become apparent to a reasonably prudent operator or user;
 - the Customer failing to follow any instructions or guidelines provided by Marco; or
 - fire, war and tear, any accident, or act of God.
- 12.10 Marco may in its absolute discretion accept non-defective Goods for return in which case Marco will refund the Customer the price paid less a handling fee of up to ten percent (10%) of the value of the returned Goods plus any freight costs.
- 12.11 Notwithstanding anything contained in this clause if Marco is required by a law to accept a return then Marco will only accept a return on the conditions imposed by that law.
- 13. Default and Consequences of Default**
- 13.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and a half percent (2.5%) per calendar month (and at Marco's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 13.2 If the Customer pays any money to the Customer shall indemnify Marco from and against all costs and disbursements incurred by Marco in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, Marco's contract default fee, and bank dishonour fees).
- 13.3 Further to any other rights or remedies Marco may have under this contract, if a Customer fails to pay to Marco, and the transaction is subsequently reversed, the Customer shall be liable for the amount of the reversed transaction, in addition to any further costs incurred by Marco under this clause 13 where it can be proven that such reversal is found to be illegal, fraudulent or in contravention to the Customer's obligations under this agreement.
- 13.4 Without prejudice to Marco's other remedies at law Marco shall be entitled to call upon or any part of any order of the Customer which remains unfulfilled and all amounts owing to Marco shall, whether or not due for payment, become immediately payable if:
- any money payable to Marco becomes overdue, or in Marco's opinion the Customer will be unable to make a payment when it falls due;
 - the Customer has exceeded any applicable credit limit provided by Marco;
 - the Customer becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
 - a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Customer or any asset of the Customer.
- 14. Cancellation**
- 14.1 Without prejudice to any other remedies Marco may have, if at any time the Customer is in breach of any obligation (including those relating to payment) under these terms and conditions Marco may suspend or terminate the supply of Goods to the Customer. Marco will not be liable to the Customer for any loss or damage the Customer suffers because Marco has exercised its rights under this clause.
- 14.2 Marco may cancel any contract to which these terms and conditions apply or cancel delivery of any Goods at any time before the Goods are delivered by giving written notice to the Customer. On giving such notice Marco shall refer to the Customer any money paid by the Customer for the Goods. Marco shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 14.3 In the event that the Customer cancels delivery of Goods the Customer shall be liable for any and all loss incurred (whether direct or indirect) by Marco as a direct result of the cancellation (including, but not limited to, any loss of profits).
- 14.4 Cancellation of orders for Goods made to the Customer's specifications, or for non-stockist items, will definitely not be accepted once production has commenced, or an order has been placed.
- 15. Dispute Resolution**
- 15.1 If a dispute arises between the parties to this contract, then either party shall send to the other party a notice of dispute in writing adequately identifying and providing details of the dispute. Within fourteen (14) days after service of a notice of dispute, the parties shall confer at least once, to attempt to resolve the dispute. At any such conference each party shall be represented by a person having authority to agree to a resolution of the dispute. In the event that the dispute cannot be so resolved either party may by further notice in writing delivered by hand or sent by certified mail to the other party refer such dispute to arbitration. Any arbitration shall be:
- referred to a single arbitrator to be nominated by the President of the Institute of Arbitrators Australia and
 - conducted in accordance with the Institute of Arbitrators Australia Rules for the Conduct of Commercial Arbitration.
- 16. Compliance Laws**
- 16.1 Marco warrants that Products manufactured on its registered premises, and supplied to all Customers, shall meet all safety regulations and standards as defined by the Hazard Analysis and Critical Control Points (HACCP), Food Safety Programme, and is eminently suitable for public consumption and thereby compliant with the Australia New Zealand Food Standards Code.
- 17. Privacy Act 1988**
- 17.1 The Customer agrees for Marco to obtain from a credit reporting body (CRB) a credit report containing personal credit information (e.g. name, address, D.O.B, occupation, previous credit applications, credit history) about the Customer in relation to credit provided by Marco.
- 17.2 The Customer agrees that Marco may exchange information about the Customer with those credit providers and with related body corporates for the following purposes:
- to assess an application by the Customer; and/or
 - to notify other credit providers of a default by the Customer; and/or
 - to exchange information with other credit providers as to the status of this credit account, where the Customer is in default with other credit providers; and/or
 - to assess the creditworthiness of the Customer including the Customer's repayment history in the preceding two (2) years.
- 17.3 The Customer consents to Marco being given a consumer credit report to collect overdue personal information on commercial credit.
- 17.4 The Customer agrees that personal credit information provided may be used and retained by Marco for the following purposes (and for other agreed purposes or required by):
- the provision of Goods; and/or
 - analysing and verifying and checking the Customer's credit, payment and/or status in relation to the provision of Goods; and/or
 - processing of any payment instructions, direct debit facilities and/or credit facilities requested by the Customer; and/or
 - enabling the collection of amounts outstanding in relation to the Goods.
- 17.5 Marco may give information about the Customer to a CRB for the following purposes:
- to obtain a consumer credit report;
 - allow the CRB to create or maintain a credit information file about the Customer including credit history.
- 17.6 The information given to the CRB may include:
- personal information as defined in 17.1 above;
 - name of the credit provider and that Marco is a current credit provider to the Customer;
 - whether the credit provider is a licensee;
 - type of consumer credit;
 - details concerning the Customer's application for credit or commercial credit (e.g. date of commencement/termination of the credit account and the amount requested);
 - advice of consumer credit defaults, overdue accounts, loan repayments or outstanding monies which are overdue by more than sixty (60) days and for which written notice has been requested for recovery of payment and debt recovery action commenced or alternatively that the Customer no longer has any overdue accounts and Marco has been paid or otherwise discharged and all details surrounding that discharge (e.g. dates of payments);
 - information that, in the opinion of Marco, the Customer has committed a serious credit default; and
 - advice that the amount of the Customer's overdue payment is equal to or more than one hundred and fifty dollars (\$150).
- 17.7 The Customer shall have the right to request (by e-mail from Marco):
- a copy of the information about the Customer retained by Marco and the right to request that Marco correct any incorrect information; and
 - that Marco does not disclose any personal information about the Customer for the purpose of direct marketing.
- 17.8 Marco will destroy personal information upon the Customer's request (by e-mail) or if it is no longer required unless it is required in order to fulfil the obligations of this agreement or is required to be maintained and/or stored in accordance with the law.
- 17.9 The Customer can make a privacy complaint by contacting Marco via e-mail. Marco will respond to that complaint within seven (7) days of receipt and will take all reasonable steps to make a decision as to the complaint within thirty (30) days of receipt of the complaint. In the event that the Customer is not satisfied with the response provided, the Customer can make a complaint to the Information Commissioner at www.oaic.gov.au.
- 18. Service of Notices**
- 18.1 Any written notice given under this contract shall be deemed to have been given and received:
- by handing the notice to the other party, in person;
 - by leaving it at the address of the other party as stated in this contract;
 - by sending it by registered post to the address of the other party as stated in this contract;
 - if sent by facsimile transmission to the fax number of the other party as stated in this contract (if any), on receipt of confirmation of the transmission;
 - if sent by email to the other party's last known email address.
- 18.2 Any notice that is posted shall be deemed to have been served, unless the contrary is shown, at the time when by the ordinary course of post, the notice would have been delivered.
- 19. General**
- 19.1 The failure by either party to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect that party's right to subsequently enforce that provision. If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 19.2 These terms and conditions and any contract to which they apply shall be governed by the laws of New South Wales, the state in which Marco has its principal place of business and are subject to the jurisdiction of the courts in New South Wales.
- 19.3 Subject to clause 12 Marco shall be under no liability whatsoever to the Customer for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Customer arising out of a breach by Marco of these terms and conditions (alternatively Marco's liability shall be limited to damages which under no circumstances shall exceed the Price of the Goods).
- 19.4 Neither party shall assign or sub-contract all or any part of their rights and obligations under this agreement without the written consent of the other party.
- 19.5 The Customer agrees that Marco may amend these terms and conditions by notifying the Customer in writing. These changes shall be deemed to take effect from the date on which the Customer accepts such changes, or otherwise at such time as the Customer makes a further request for Marco to provide Goods to the Customer.
- 19.6 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.
- 19.7 Both parties warrant that they have the power to enter into this agreement and have obtained all necessary authorisations to allow them to do so, they are not insolvent and that this agreement creates binding and valid legal obligations on them.