



McCain TERMS AND CONDITIONS

These Terms & Conditions apply, as further described in Section 1(e), to any purchase orders or any other means of selling between McCain Foods (Aust) Pty Ltd ABN 96 000 629 587 (“**McCain**”) and the person buying the products manufactured, prepared or sold by McCain, as specified in the Order, as defined below (each a “**Good**”) (“**Customer**”) (hereafter referred to collectively as the “**Parties**”) and any part or component thereof and incorporated therein.

1. CUSTOMER ORDER

- (a) **Conclusion.** Customer will specify the Goods ordered in a purchase order or other document issued by Customer, in a format specified by McCain or as otherwise approved by McCain, and such order will be considered as binding on both Parties upon confirmation in writing by McCain (an “**Order**”). An Order will constitute Customer’s unconditional obligation to receive the Order, make payment in full and accept these Terms & Conditions.
- (b) **Changes.** McCain reserves the right in its sole discretion to make changes in, reasonable substitutions to, deductions from and additions to the Goods ordered. In the event such changes, substitutions, deductions and/or additions result in a material change in the value of the Order, the Parties may make a negotiated change in the Order price.
- (c) **Termination for default.** McCain may terminate all or any part of an Order with immediate effect and without compensation for any Customer default. If McCain terminates all or part of an Order because of any default by Customer, Customer shall pay and compensate McCain for any resulting losses and damages that McCain may suffer, incur

or have asserted against it, including but not limited to prepayments to third parties (including affiliates) and similar costs of delivering the Goods. In addition, all unpaid invoices will immediately become due and owing in full and McCain may withhold delivery of any Goods already paid for under this or any other agreement between the Parties, until such time as the compensation has been delivered by Customer.

- (d) **Termination/cancellation for insolvency.** In the event Customer or any of its affiliates has been declared bankrupt, is in a state of liquidation or administration, has an administrator, receiver or receiver and manager appointed to any of its assets, has any of its assets seized by the holder of a security, has ceased its business, is unable to pay its debts when due, is the subject of a court order or preventative legal scheme of settlement, its commercial activities have been suspended or if it is in any similar situation arising from a procedure of the same nature that exists in the legislation and regulations applicable to Customer (each an “**Insolvency Event**”), prior to delivery of all Goods pursuant to the Order, McCain may at its option terminate the Order and claim damages.
- (e) **Applicable terms and conditions.** These Terms & Conditions apply to the Order, and to tenders, offers, quotations, deliveries, and any specific contract or master agreement under which the Order is being made, unless these Terms & Conditions are expressly excluded therein. Customer’s general conditions however called or wherever referred to, including as may be attached to a purchase order or similar document, shall not be



applicable to the Order, tender, offer, quotation, delivery or specific contract or master agreement between McCain and Customer and are herewith explicitly rejected. In case of conflicting clauses, to the extent necessary to resolve the conflict, the following order of interpretation shall apply: (i) specific contract or master agreement; (ii) terms specified or accepted by McCain on the face of the Order; and (iii) these Terms & Conditions.

2. PRICE/INVOICE/PAYMENT

- (a) **Prices.** Unless otherwise agreed in writing (which for clarity shall include the Order), the price payable by Customer for the Goods shall be McCain's list price in force at the date of delivery and all Orders may be subject to minimum quantity requirements, as communicated by McCain to Customer from time to time. An Order that does not meet minimum quantity requirements may be subject to an additional surcharge. Prices are exclusive of all taxes, levies, commissions, and charges. An increase in any taxes, levies and other charges imposed by any government or other authority prior to delivery will be borne by Customer. Unless the Order specifies otherwise, the cost of delivery and transport are excluded in the price. These Terms & Conditions are an integral part of the price quoted to Customer and any request by Customer to deviate that is accepted by McCain may result in a change in price. McCain may change prices by giving written notice to Customer. Any new prices apply to orders made after the date specified in the notice as the effective date of the price change.
- (b) **GST.** Unless otherwise stated, the price for the Goods excludes any GST McCain is required to pay on the supply of the Goods to Customer. All prices are in Australian dollars. In addition to the price for the goods payable by the Customer to McCain, Customer must pay to McCain an amount equal to any GST that McCain

is liable for on any supply by McCain under these Terms & Conditions.

Customer must pay amounts for GST, without deduction or set off of any other amounts, at the same time and on the same basis as the price is paid by Customer.

- (c) **Payment.** Customer will pay the amount invoiced by McCain with respect to the Goods by bank transfer (or if bank transfer is not available, cheque), within 30 days of the date of the invoice. Any variation to the terms of payment may only be made by agreement with McCain. McCain reserves the right at any time before proceeding further with an Order to demand full or partial payment of any amounts owing under any agreement between the Parties. Disputes and/or claims do not constitute ground for non-payment of amounts by Customer other than those in dispute.
- (d) **Application of payments:** McCain can apply amounts it receives from Customer, including under Section 3, towards amounts owing to it in such order as McCain chooses.
- (e) **Interest on overdue amounts.** Unless otherwise agreed to in writing by McCain, Customer must pay interest on overdue amounts at the rate of 4% per annum above the prevailing Westpac Banking Corporation business overdraft rate on the outstanding balance and that interest accrues daily until the total debt is completely satisfied by Customer and received by McCain.
- (f) **Refusal of further supply.** McCain may refuse further supply of any Goods to Customer where a cheque is issued for the satisfaction, whether full or partial, of a debt and that cheque is dishonoured or where any monies owing by Customer remain outstanding after the due date for payment.
- (g) **Credit facility.** Customer acknowledges that it is not entitled to



any credit facility until it receives notice from McCain that credit facilities have been granted. Until Customer receives such written notice from McCain, any Goods that are supplied by McCain will be on the basis of cash upon delivery. If, prior to approving a credit facility, McCain grants to Customer time to pay for any Goods supplied then such supply will not amount to a waiver by McCain of any of the terms of the Commercial Credit Application and Trading Terms nor be construed as being by implication a grant of credit facilities. McCain may vary the terms of the credit facility (including, without limitation, the interest rate payable from time to time) or withdraw the credit facility at any time and without notice to Customer or guarantor who has executed a deed of guarantee and indemnity with McCain (“**Guarantor**”).

- (h) **Collection expenses.** All costs, expenses and disbursements incurred by McCain: (i) in the maintenance of Customer's account; (ii) in connection with Customer's default in observing these Terms & Conditions including debt collection agency fees and legal costs (on a solicitor/client basis without the necessity for taxation); (iii) as a result of any of Customer's cheques being dishonoured; or (iv) by reason of McCain requiring further security to be provided, are payable by Customer upon demand.

3. GOODS AND SECURITY

- (a) **Interpretation.** In this Section 3 terms have the meanings given to them in the *Personal Property Securities Act 2009* (Cth) (“**PPS Act**”), unless the context requires otherwise.
- (b) **Specifications.** Goods provided under an Order are, to McCain's knowledge: (i) free of all liens, encumbrances and security interests; and (ii) not restricted for sale by McCain to Customer.
- (c) **Regulations.** McCain represents and warrants that, to its knowledge, the

Goods have been manufactured in accordance with all applicable laws, regulations, codes and standards of the country of manufacture.

- (d) **Transfer of ownership and risk.** The risk associated with Goods supplied under the Order shall pass to Customer in accordance with the applicable Incoterms. Title to the Goods shall remain with McCain until payment in full has been received by McCain of all monies owing to McCain by the Customer. If Customer fails to pay any monies owed to McCain when it is due or an Insolvency Event occurs in respect of the Customer, without prejudice to any other right, McCain or its agent is entitled to enter immediately onto Customer's premises or any other premises where Goods are known to be located at any time and retake possession of all Goods. McCain may, in its absolute discretion, retain or sell any Goods it repossesses.
- (e) **Warranty.** Except for the warranties expressly set out herein, McCain disclaims any and all representations, warranties and conditions of any kind or nature, express or implied, including without limitation representations, warranties and conditions of quality, merchantability, fitness for purpose, title and those arising by statute or otherwise in law or from a course of dealing or use of trade.
- (f) **Security interests.**
- (i) Customer agrees that McCain's security interest under Section 3(d) is over all Goods, any proceeds of the Goods, and any product or mass that the Goods may be or become part of. The Goods, proceeds and product or mass are referred to in this Section 3(f) collectively as the “**Collateral**”.
- (ii) Customer undertakes, if it disposes of any Collateral, that it will receive proceeds at least equal to the market value of the Collateral, and that it will not allow any other security interest



to exist over those proceeds if that security interest could rank ahead of McCain's security interest. If such a security interest does arise despite the previous sentence, Customer must ensure that it receives cash proceeds for the Collateral at least equal to the market value of the proceeds, and must immediately pay those proceeds to McCain in reduction of the amount owing to it.

- (iii) McCain at its sole and unfettered discretion, may at any time and from time to time, set off any amount owing by McCain to Customer on any account whatever, including any monies held by McCain for or on account of Customer, whether or not that amount has become due and payable or whether that amount is due actually or contingently, against any amount owing by Customer to McCain in respect of Goods, whether or not that amount has become due and payable and whether that amount is due actually or contingently.
- (iv) If Customer fails to pay any monies owed to McCain when it is due or an Insolvency Event occurs in respect of the Customer, McCain may enforce its security interest in any Collateral by exercising all or any of its rights under this Section 3.
- (g) **Further security.** To secure payment of all monies that may become due and payable by Customer to McCain, Customer also grants McCain:
 - (i) a security interest over all present and after-acquired property in relation to which Customer can be a grantor of a security interest under the PPS Act, whether or not Customer has title to the property (“**PPS Property**”); and

- (ii) a fixed charge over all present and after-acquired property of Customer that is not PPS Property (“**Non-PPS Property**”).

For the purposes of s 20(2)(b)(ii) of the PPS Act, the security interest in this Section 3(g) is in all Customer's present and after-acquired property. However, this does not limit the scope of this Section 3(g).

McCain may from time to time require further security containing such terms and conditions as McCain determines in its absolute discretion, to be given as a condition precedent for the continuation of the credit facility. For the purposes of this Section 3(g), further security includes: (a) guarantees by such third persons as McCain determines in its absolute discretion; and (b) security over the whole or any part of Customer's or a Guarantor's assets or undertaking.

(h) **Perfection of security interests.**

- (i) Customer acknowledges that McCain may register one or more financing statements in relation to its security interests. Customer waives its right under s 157 of the PPS Act to receive notice of any verification statement relating to the registration of any such financing statement or any related financing change statement.
- (ii) Customer must promptly do anything McCain requires to ensure that its security interests are perfected security interests and have priority over all other security interests.

(i) **Confidentiality.**

- (i) Customer and McCain agree not to disclose information of the kind mentioned in s 275(1) of the PPS Act, except in the circumstances required by ss 275(7)(b) to (e) of the PPS Act.



Customer agrees that it will only authorise the disclosure of information under s 275(7)(c), or request information under s 275(7)(d), if McCain approves.

- (ii) To the extent that it is not inconsistent with this Section 3(i) constituting a "confidentiality agreement" for the purposes of section 275(6)(a) of the PPS Act, Customer agrees that McCain may disclose information of the kind mentioned in section 275(1) of the PPS Act to the extent that McCain is not doing so in response to a request made by an "interested person" (as defined in section 275(9) of the PPS Act) pursuant to section 275(1) of the PPS Act.

- (j) **Enforcement.** To the extent that Chapter 4 of the PPS Act would otherwise apply to an enforcement by McCain of any security interest, Customer and McCain agree that the following provisions of the PPS Act do not apply: (i) to the extent that s 115(1) of the PPS Act allows them to be excluded: ss 95, 118, 121(4), 125, 130, 132(3)(d), 132(4), 135, 138B(4), 142 and 143; and (ii) in addition, to the extent that section 115(7) of the PPS Act allows them to be excluded: sections 127, 129(2) and (3), 132, 133(1)(b), 134(2), 135, 136(5), 137 and 140.

- (k) **General.** Nothing in Section 3 is: (a) limited by any other provision of these Terms & Conditions or any other agreement between McCain and Customer; or (b) limits McCain's rights or Customer's obligations apart from under this Section 3.

4. DELIVERY

- (a) **Conditions.** Where applicable pursuant to the Order, Customer shall at the request of McCain promptly supply McCain with details necessary to allow McCain to make delivery and shall accept delivery whenever McCain proffers or is prepared to proffer

delivery. If Customer does not comply with the foregoing it will not be entitled to withhold any payment, shall accept revised delivery dates at McCain's sole discretion, and shall indemnify McCain against any consequential loss and loss of profit, damage or expense that McCain may suffer, incur or have asserted against it, and McCain may enforce its remedies for payment and may (at its option) cancel the intended delivery and sell the Goods to which the intended delivery related without prejudice to its right to claim damages in respect of this breach of contract or may store the Goods at Customer's risk in a place of its choosing at the cost of Customer and delivery by McCain of a deposit, receipt or other evidence of storage to Customer shall be deemed to be delivery of the Goods. Customer shall be solely responsible for the proper unloading of the Goods, unless the Order specifies otherwise in Incoterms. If, to assist Customer to remove the Goods from the point of delivery, McCain or any subcontractor does any loading or unloading of the Goods free of charge (and contrary to the Incoterms specified herein or in the Order), no liability whatsoever shall thereby be incurred by McCain or subcontractor and Customer shall indemnify McCain or subcontractor for any claims or damages that McCain may suffer, incur or have asserted against it in respect thereof. The latest version of Incoterms (International Chamber of Commerce) is applicable to the delivery of Goods. Unless otherwise stated within the Order, the Goods shall be EXW McCain's relevant manufacturing facility.

- (b) **Delivery time.** Time is not of the essence in respect of the Goods and any time or date specified by McCain as the time at which or the date on which the Goods will be dispatched or delivered (or as the case may be for Goods made available for collection) is given and intended as an estimate only and McCain shall not be liable for any loss, damage or expense howsoever arising from delay in delivery. In the



event of delay, McCain is entitled either to cancel all or part of the Order or to require continued performance by Customer, in each case without prejudice to McCain's rights to claim damages and other remedies at law and in equity.

- (c) **Customer's Obligations and Claims on Delivery.** Customer will examine Goods carefully immediately upon delivery and will notify McCain (and any carrier for McCain) in writing within *48 hours following delivery* of any error in quantity or weight or description of the Goods delivered or of any damage to the Goods revealed by such examination and not caused since delivery was taken. Failure to make any such notification (which such an examination above should have enabled Customer to make) shall constitute a waiver by Customer of all claims based on or relating to facts which such examination should have revealed.
- (d) **Foreseen delay.** Without excusing delay and without prejudice to McCain's rights, Customer shall immediately notify McCain in writing at the moment any delay in its ability to take receipt of the Goods is foreseen, and promptly submit a proposal indicating the measures Customer shall take at no cost to McCain to maintain the agreed delivery time.
- (e) **Packaging.** Delivery of the Goods shall be done in McCain's standard packaging and shall not be varied unless agreed otherwise by the parties.

5. **PERFORMANCE**

If the Goods are not in conformity with these Terms and Conditions, McCain may in its sole discretion, at no cost to Customer, choose between: (i) correction of the non-conformity by McCain; (ii) replacement of the Goods by McCain; (iii) replacement of the Goods by equivalent Goods in conformity with the specifications for those Goods; and (iv) return of the Goods to McCain and cancellation of all or part of the Order. This shall constitute Customer's sole remedy.

6. **ASSIGNMENT**

Customer shall not assign all or part of the Order or any rights or obligations arising under these Terms & Conditions, without McCain's prior written consent.

7. **GENERAL**

- (a) **Limitation of liability and indemnification.** The limit of McCain's and its affiliates' liability to Customer, its affiliates or to any third party in respect of the relationship with Customer or these Terms & Conditions and the Goods, shall not in the aggregate exceed the amount paid by Customer to McCain under the Order. This limitation will apply irrespective of the nature of the cause of action, demand or action, including, but not limited to, breach of contract, negligence, tort or any other legal theory and survive a fundamental breach or breaches and/or failure of the essential purpose of these Terms & Conditions, or any remedy contained in them. Any action brought by Customer must be brought within two years after the cause of action arose. Customer shall be liable towards McCain for and hold McCain and its affiliates and their directors, officers, employees, agents and contractors, harmless from and indemnify them against any and all actual or contingent damage, loss, personal injury (including death), expense, cost, fine, penalty, claim, including reasonable legal fees and litigation costs, suffered or incurred by or asserted against McCain and its affiliates and their directors, officers, employees, agents and contractors, resulting from or connected with the Order, except to the extent that such damage, loss, personal injury, expense, cost, fine, penalty or claim is caused solely by McCain's and/or its affiliates' willful misconduct or gross negligence. Notwithstanding any other applicable provision or law, neither McCain nor its affiliates shall be liable to Customer for loss of profits or for any indirect, consequential, special or punitive damage arising directly or indirectly from any breach, fundamental or otherwise, of these



- Terms & Conditions or the Order or from any tortious acts or omissions, whether or not McCain or its affiliates have been made aware of such breach, acts or omissions.
- (b) **Intellectual Property Rights.** Customer is not entitled to make use of or refer to any trademark, trade name, patent, design, copyright, or other intellectual property right of McCain or any of its affiliates, unless it has obtained prior written consent of and an appropriate licence from McCain.
- (c) **Confidentiality.** All McCain information, shared between the parties in the context of the Order, including the Order, will be treated as confidential information. McCain Confidential information shall not be used for any purpose other than for the execution of the Order, will only be communicated and distributed to those employees of Customer with a need to know and will not be further disclosed without the prior written consent of McCain.
- (d) **Privacy.** Customer will fully comply with McCain's privacy policy and security requirements as set forth at McCain's website, or as may be provided by McCain upon request, which is incorporated herein and forms part of these Terms & Conditions.
- (e) **Force Majeure.** Neither party shall be liable towards the other party for any failure to fulfill any term or condition of the Order if fulfillment thereof has been delayed, interfered with or prevented by any event not reasonably foreseen and beyond the control of the party concerned, provided that Customer is not already in default of those obligations under the Order which are being delayed, interfered with or prevented and provided further that no force majeure event shall be deemed an acceptable basis for non-payment. Late supply of materials, labour unrest or unavailability of utilities to McCain or its sub-suppliers or subcontractors is deemed force majeure. If a situation of force majeure continues for more than 30 days, McCain shall be entitled to terminate the Order by written notice. McCain shall be entitled to postpone or cancel delivery in whole or in part when it is delayed in or prevented from making or obtaining any goods or materials or services therefor or making delivery thereof by strikes, lock-outs, trade disputes, labour troubles or any other cause beyond McCain's control. During any of the foregoing events, McCain's obligations shall be suspended until such events cease or until McCain cancels delivery (as the case may be) and McCain shall not be required to obtain elsewhere in the market goods with which to replace or permit it to produce the Goods, delivery of which has been postponed or cancelled as a result of any of the said events. In event of cancellation, McCain shall be paid pro rata for Goods delivered to the date of cancellation.
- (f) **Severability.** If (a) provision(s) hereof or of the Order should be or become ineffective or invalid for whatever reason, the other provisions will not be affected thereby. The parties agree to replace the ineffective or invalid provision(s) by an effective and valid arrangement, which achieves as closely as possible the purpose intended by the ineffective or invalid provision(s) (as evidenced by the wording contained herein).
- (g) **Waiver.** Failure by either party to require strict performance by the other party of any obligation hereunder shall in no way affect its right thereafter to enforce any obligation, nor shall a waiver by either party of any breach be held to be a waiver of any previous or later breach. No waiver will have any effect unless specific, irrevocable and in writing.
- (h) **Amendment.** These Terms & Conditions may be amended or superseded from time to time by notice given by McCain by any means.



- (i) **Change of control.** Customer must notify McCain in writing at least 14 days before any proposed change of ownership, shareholding, control or the directors of Customer and Customer and Guarantor will be liable for any Goods supplied to Customer notwithstanding any such change. Customer indemnifies McCain against any loss or damage that may result from Customer's failure to notify McCain of any such change.
- (j) **Claims.** Customer acknowledges and agrees that no claims will be accepted, refunds made or credits given by McCain to Customer in respect of any Goods that are frozen goods if such claim is made or refund or credit is requested greater than 24 hours after delivery of such Goods to Customer.
- (k) **Trustee.** Where Customer enters into the Commercial Credit Application and Trading Terms as trustee of a trust: (a) Customer warrants that it has authority and power to enter into the Commercial Credit Application and Trading Terms and to perform its obligations under the Commercial Credit Application and Trading Terms in accordance with the provisions of the trust instrument and by operation of law; and (b) Customer agrees to be bound and liable both in its own capacity and as trustee of the trust.
- (l) **General.** These Terms & Conditions are binding on the parties and their respective successors and assigns. The warranties and indemnities in these Terms & Conditions survive the termination of the Commercial Credit Application and Trading Terms.

that those courts are an inconvenient forum. The United Nations Convention, concluded at Vienna on 11th of April 1980, on contracts for the International Sale of Goods shall not apply.

- (b) **Disputes.** Pending a dispute, Customer shall not be excused from performing any of its obligations under these Terms & Conditions, including payment, except for obligations directly affected by the dispute.

8. GOVERNING LAW / DISPUTES

- (a) **Governing law.** Any legal relation between McCain and Customer shall be governed by and interpreted in accordance with the law in force in the State of Victoria and Customer hereby expressly submits to the non-exclusive jurisdiction of the courts of the State of Victoria and any court that may hear appeals from those courts. Customer waives any right it might have to claim