



MEXEX (EST NO. 515)
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Terms and Conditions of Trade

Mexican Express Pty Ltd
ABN 93 053 661 484
Effective 1 June 2018

This document replaces all previous Terms and Conditions held with Mexican Express. Signed acknowledgement of this document is requested to be returned to Mexican Express however the Buyer is taken to have exclusively accepted and is immediately bound, jointly and severally, by these Terms and Conditions if the Buyer places an order for or accepts delivery of Goods on or after 1 June 2018. Access to this document is available via our website www.mexicanexpress.com.au.

Associated documents: Mexican Express Credit Application

The Buyer acknowledges and agrees to the Terms and Conditions set out in this document.

Buyer: company

Executed by the Applicant in accordance with section 127 (1) of the Corporations Act 2001 (Cth):

Signature of Director A
Name (please print)
Signature of Director B
Name (please print)
Date

Buyer: individual or partnership

Signed
Name (please print)
Signed
Name (please print)
Date

List any other directors/company secretary.

1. :

- 1.1 'Buyer' means any person, company, individual or partnership purchasing goods from the Seller.
1.2 'Competition and Consumer Act' means the Competition and Consumer Act 2010 (Cth).
1.3 'Corporations Act' means the Corporations Act 2001 (Cth).
1.4 'Goods' means any products manufactured or supplied by the Seller from time to time.
1.5 'GST Act' means Goods and Services Tax Act 1999 (Cth).
1.6 'Event of Default' means in relation to the Buyer, the occurrence of any one or more but not restricted to, of the following events:
1.6.1 The Buyer fails to comply with any obligations under these Terms and Conditions.
1.6.2 An Insolvency Event occurs in relation to the Buyer.
1.6.3 The Buyer fails to pay by the due date any amount due and payable by it under these Terms and Conditions or
1.6.4 The Buyer becomes unable to perform all or any of its obligations and take all or any actions contemplated by these Terms and Conditions.

- 1.7 **'Insolvency Event'** means, in relation to the Buyer, any one or more, but not restricted to, of the following events or circumstances occurring:
- 1.7.1 Being in liquidation or provisional liquidation or under administration.
  - 1.7.2 Being taken under section 459F(1) of the Corporations Act to have failed to comply with a statutory demand.
  - 1.7.3 Being unable to pay its debts as and when they fall due for payment or being otherwise insolvent.
  - 1.7.4 Becoming insolvent under administration, as defined in section 9 of the Corporations Act.
  - 1.7.5 Entering into a compromise or arrangement with, or assignment for the benefit of, any of its members or creditors.
  - 1.7.6 Any similar event or circumstance under the laws of any jurisdiction.
- 1.8 **'Invoice'** means the written statement from the Seller stating the amount payable for the Goods supplied by the Seller to the Buyer.
- 1.9 **'Parties'** means the Buyer and the Seller and a 'Party' means any one of them.
- 1.10 **'Personal Information'** means information of or relating to a person and where applicable, includes 'personal information' (as that defined in the Privacy Act 1988 (Cth)).
- 1.11 **'PPSA'** means the Personal Property Securities Act 2009 (Cth).
- 1.12 **'PMSI'** means a purchase money security interest as defined by the PPSA.
- 1.13 **'Premises'** means the seller's premises at 87 Harrison Road Dudley Park, South Australia, 5008 or such other location as notified by the Seller to the Buyer from time to time.
- 1.14 **'Specified Rate'** means the rate that is 1.5% per annum above the overdraft rate specified from time to time by the Reserve Bank for the corresponding month/s the debt is outstanding.
- 1.15 **'Purchase Order'** means an order for goods from the Buyer from time to time, whether delivered by email, facsimile or any other means.
- 1.16 **'Seller'** means Mexican Express Pty Ltd ABN 93 053 661 484
- 1.17 **'Supply Agreement'** means an addendum to these Terms and Conditions of Trade as agreed to in writing by The Seller and The Buyer from time to time.
- 1.18 **'Terms and Conditions'** means these Terms and Conditions of Trade as amended by the Seller in writing from time to time.
- 1.19 Interpretation
- In these Terms and Conditions, unless the subject or the context otherwise requires:
- Reference to any party or other person includes that person's successor and permitted assigns.
  - Reference to a person includes a reference to a natural person, partnership, corporation, trust, estate, sole partnership, joint venture, government/government subdivision or agency, association, cooperative and any other legal or commercial entity.
  - Money amounts are in Australian currency unless otherwise stated.
  - Nothing shall be read or applied so as to exclude, restrict or modify or have the effect of excluding, restricting or modifying any conditions, warranty, guarantee, right or remedy implied or imposed by law (including the Competition and Consumer Act) and which by law cannot be excluded, restricted or modified.

## 2.

- 2.1 These Terms and Conditions may only be amended with the Seller's consent in writing.
- 2.2 Subject to clause 2.3 of this document these Terms and Conditions shall prevail to the extent of any inconsistency with any other document.
- 2.3 The Buyer and the Seller may agree to a 'Supply Agreement' from time to time. The 'Supply Agreement' is an addendum to these Terms and Conditions and does not replace these Terms and Conditions. The 'Supply Agreement' provision/s will prevail when inconsistency is identified in the 'Supply Agreement' and corresponding provision/s in these Terms and Conditions. All other provisions within these Terms and Conditions prevail and obligations remain the same by the Seller and the Buyer.
- 3.1. The Buyer represents and warrants, as at the date of each Purchase Order that:
- 3.1.1. It has submitted to the Seller and each day that credit is provided, that any information provided to the Seller by or on behalf of the Buyer under an application for credit is true and correct in every particular and is not misleading or deceptive in any way.
  - 3.1.2. The person's whose name or signature appears in respect of the Buyer on an application for credit provided to the Seller are duly authorised to sign on behalf of the Buyer.
- 3.2. The Buyer must notify the Seller immediately in writing as soon as it becomes aware of any matter or thing which renders any information provided to the Seller under an application for credit to be incomplete, untrue, misleading, incorrect or deceptive.
- 3.3. The Seller may in its absolute discretion:
- 3.3.1. Accept or reject any application for credit made by the Buyer and is under no obligation to provide reasons for such rejection.
  - 3.3.2. By written notice to the Buyer, withdraw the Seller's acceptance of any application for credit made by the Buyer and is under no obligation to provide reasons for such withdrawal.
- 3.4. The Seller may by written notice to the Buyer require such security or additional security for any credit arrangements with the Buyer as the Seller in its discretion thinks fit and may withhold supply of any Goods or credit arrangements until such security or additional security is provided by the Buyer.
- 4.1 On submitting a Purchase Order the Buyer accepts and agrees to be bound by these Terms and Conditions.
- 4.2 The Seller reserves the right to not accept any Purchase Orders for Goods from time to time.
- 4.3 A Purchase Order cannot be cancelled by the Buyer once it has been accepted by the Seller unless agreed to in writing by the Seller.
- 5.1 The Seller has established standard payment terms of thirty (30) days from invoice date.
- 5.2 By negotiation between the Seller and the Buyer alternative payment terms for approved Buyers may be determined on submission of the Credit Application. The approved terms will be stated on the Credit Application over-riding the reference to standard payment terms referred to in clause 5.1 in these Terms and Conditions.
- 5.3 At the Seller's sole discretion payment terms may differ without prejudice, from Buyer to Buyer from time to time.

- 5.4 The Buyer may not withhold payment or make any deduction or off-set any amount owing to the Seller without the Seller's prior written consent.
- 5.5 All sales are subject to limits as to minimum quantity or cash value of order as the Seller nominates from time to time.
- 5.6 Unless agreed in writing or otherwise, the price for Goods will be the Seller's list price in effect at the time of dispatch of the Goods.
- 5.7 At its discretion, the Seller may withdraw any credit or limit the amount of credit extended to the Buyer at any time.
- 5.8 Where applicable, the Buyer is liable for any GST on the Goods as determined by the GST Act.
- 6.1 If an Event of Default occurs, then the Seller may do any one or more of the following:
- 6.1.1. Suspend performance of its obligations under these Terms and Conditions until all amounts owing by the Buyer to the Seller are paid in full.
- 6.1.2. Charge interest on the amount outstanding at the Specified Rate accruing daily from and including the due date for payment until the date of payment in full.
- 6.1.3. If applicable continue to perform its obligations under these Terms and Conditions on a cash delivery basis.
- 6.2 In the event that the Buyer's payment is dishonoured for any reason the Buyer shall be liable for any dishonour fees incurred by the Seller.
- 6.3 If the Buyer defaults in payment of any invoice when due, the Buyer shall indemnify the Seller from and against all costs and disbursements incurred by the Seller in pursuing the debt including, but not limited to, legal and debt collection costs.
- 7.1 The risk of damage to, or loss of, the Goods passes at the time of delivery or receipt of goods if collecting from the Premises. To the extent that the Seller accepts responsibility for damage to Goods in transit, such responsibility ceases on delivery to the Buyer. The Seller will accept no liability for damage to Goods in transit unless notified in writing by the Buyer to it and to the carrier concerned within 24 hours after delivery of the Goods to the Buyer.
- 7.2 The Buyer must examine the Goods on receipt and notify The Seller of any defect/damage which is reasonably apparent within 24 hours of delivery. Where the Buyer discovers a non-apparent defect/damage the Buyer must stop using the Goods and return them to the Seller in accordance with the Sellers instructions. The Buyer must provide all necessary assistance to allow the Seller to investigate such defect/damage. The Buyer must in all cases perform proper quality control checks on all Goods received and notify a non-apparent defect /damage from time of delivery.
- 8.1. Theto either pay the amount of the Proceeds of re-supply to the Seller immediately when they are received or pay those proceeds into an account with a bank or financial institution or deposit taking institution as trustee for the Seller.
- 8.5.2. The Buyer agrees that whilst property and title in the goods remains with the Seller, the Seller has the right, with or without prior notice to the Buyer, to enter upon any premises occupied by the Buyer (or any receiver, receiver and manager, administrator, liquidator or trustee in bankruptcy of the Buyer) to inspect the Goods of the Seller and to repossess the Goods which may be in the Buyer's possession, custody or control when payment is overdue.
- 8.5.3. The Buyer will be responsible for the Seller's costs and expenses in exercising its rights under clause 9.2.3. Where the Seller exercises any power to enter the premises, that entry will not give rise to any action of trespass or similar action on the part of the Buyer against the Seller, its employees, servants or agents.
- 8.5.4. The Buyer agrees that where the Goods have been retaken into the possession of the Seller, the Seller has the absolute right to sell or deal with the Goods, and if necessary, sell the Goods with the trademark or name of the Buyer on those Goods, and the Buyer hereby grants an irrevocable licence to the Seller to do all things necessary to sell the Goods bearing the name or trademark of the Buyer.
- 9.1. Defined terms in this section have the same meaning as given to them in the PPSA.
- 9.1.1. The Seller and the Buyer acknowledge that these Terms and Conditions of Trade constitutes a Security Agreement and gives rise to a Purchase Money Security Interest (PMSI) in favour of the Seller over the Goods supplied or to be supplied to the Buyer, as Grantor, on an ongoing basis pursuant to this Terms and Conditions.
- 9.1.2. The Goods supplied or to be supplied under these Terms and Conditions fall within the PPSA classification of 'Other Goods' acquired by the Buyer pursuant to these Terms and Conditions.
- 9.1.3. The Seller and the Buyer acknowledge that the Seller, as Secured Party, is entitled to register its interest in the Goods supplied or to be supplied to the Buyer, as Grantor, under this Agreement on the PPSA Register as Collateral.
- 9.2. Pursuant to section 157 of the PPSA, unless otherwise agreed to in writing by the Seller, the Buyer waives its right to receive notification of or a copy of any Verification Statement confirming registration of a Financing Statement or a Financing Change Statement relating to a Security Interest granted by the Buyer, as Grantor, to the Seller.
- 9.3. The Buyer agrees to indemnify the Seller on demand for all costs and expenses, including legal costs and expenses on a solicitor / client basis, associated with the:
- 9.3.1. Registration or amendment or discharge of any Financing Statement registered by or on behalf of the Seller.
- 9.3.2. Enforcement or attempted enforcement of any Security Interest granted to the Seller by the Buyer.
- 9.4. The Buyer agrees, to the extent permitted by law, that:
- 9.4.1. The following provisions of the PPS Law do not apply and, for the purposes of section 115 are 'contracted out' of these Terms and Conditions namely sections 95, 96, 121(4), 123,125,129.
- 9.4.2. Nothing in sections 130 to 143 of the PPSA will apply to these Terms and Conditions or the Security under these Terms and Conditions.

Note: PPSA 2009 can be accessed via, <http://www.comlaw.gov.au/Details/C2013C00604>

- 10.1. Subject to this clause and to the maximum extent permitted by the Competition and Consumer Act and all other applicable law, the Seller is not liable to the Buyer or any third party for:
  - 10.1.1. Any loss or damage of any kind caused by or resulting from any act or omission of that other party or any of its employees, agents or contractors or;
  - 10.1.2. Any loss, damage, liability, expense, injury or death sustained or incurred by the Buyer or any other party including , but not limited to, any loss of profits or economic, special, indirect or consequential loss or damage, whether resulting directly or indirectly out of any negligence of the Seller, the supply performance or use of any goods, or out of any breach of the Seller under any contract incorporating these Terms and Conditions, even if notified of the possibility of that potential loss or damage
- 10.2. Any representation, consumer guarantee, warranty, condition or undertaking that would be implied in these Terms and Conditions or under these Terms and Conditions by legislation, common law, equity, trade, custom or usage is excluded to the maximum extent permitted by the Competition and Consumer Act and all other applicable law.
- 10.3. Nothing in these Terms and Conditions excludes, restricts or modifies any consumer guarantee, condition, warranty, right or remedy conferred on the Buyer by the Competition and Consumer Act or any other applicable law that cannot be excluded, restricted or modified by agreement.
- 10.4. Subject to clause 10.4, to the maximum extent permitted by the Competition and Consumer Act and all other applicable law, the liability of the Seller for breach of a non-excludable condition or consumer guarantee or warranty referred to in this clause is limited, at the Seller's option to any one or more of the following:
  - 10.4.1. The replacement of the Goods.
  - 10.4.2. The rework of the Goods.
  - 10.4.3. Crediting the value of the Goods to the Buyer's account.
- 10.5. The Seller shall not be liable to replace, rework or credit the Buyer's account for any sub-standard or flawed Goods pursuant to clause 10.4 unless:
  - 10.5.1. The Buyer proves to the satisfaction of the Seller that the Goods were of inferior standard at the time of delivery/collection of the Goods.
  - 10.5.2. The sub-standard/flawed goods have arisen solely from manufacturing error, inferior packaging and/or production processes.
  - 10.5.3. The Goods have not received maltreatment, inattention, interference or otherwise been used in a manner inconsistent with the Seller's recommendations or purpose for which the goods were commonly supplied.
  - 10.5.4. The sub-standard/flawed goods are returned to the Premises, within 7 days from the date when the Seller notifies the Buyer that the Seller will accept the return of the Goods, unless otherwise agreed by the Seller in writing.

The Seller shall not be liable for any failure or delay in supply or delivery of the goods where such failure or delay is wholly or partly due to any cause or circumstance whatsoever outside the reasonable control of the Seller including, but not limited to, energy outage, water supply interruption, war, strikes, lockouts, industrial disputes or unrest, government restrictions or intervention, transport delays, fire, act of God, breakdown of plant, shortage of supplies or labour, storm or tempest, theft, vandalism, riots, civil commotions or accidents of any kind.

Where the Seller has developed recipes, products or similar, the recipes, products or similar and associated documents shall remain the sole and exclusive property of the Seller and the Buyer shall acquire no right, title or interest in or to the same unless otherwise agreed to in writing by the Seller.

- 13.1. If any provision of these Terms and Conditions is invalid, void, illegal or unenforceable then the validity, existence, legality and enforceability of the remaining provisions shall not be prejudiced, affected or impaired.
- 13.2. These Terms and Conditions are governed by the laws of South Australia and the parties agree to submit all disputes arising In the event of any breach of this contract by the Seller the remedies of the Buyer shall be limited to damages which under no circumstances shall exceed the price of the Goods.
- 13.4. The Buyer agrees that the Seller may review these Terms and Conditions at any time. If, following any such review, there is to be any change to these Terms and Conditions, then the change will take effect from the date on which the Seller notifies the Buyer of such change.
- 13.5. The failure by the Seller to enforce any provision of these Terms and Conditions shall not be treated as a waiver of that provision, nor shall it affect the Seller's right to subsequently enforce that provision.
- 13.6. The Buyer must not assign any of its rights under these Terms and Conditions without the prior written consent of the Seller and any unauthorised assignment will, at the election of the Seller, be null and void.