

Brown's Conditions of Sale - November 2023

1. Interpretation

1.1 In these Conditions of Sale (Conditions):

a reference to the singular includes the plural and vice versa and if a word or phrase is defined, then other parts of speech and grammatical forms of that word or phrase have a corresponding meaning;

Additional Profits has the meaning given in clause 16;

Adjusted Delivery Date has the meaning given in clause 10.2;

Australian Consumer Law means Schedule 2 of the *Competition and Consumer Act 2010* (Cth) and the corresponding provisions of the relevant State and Territory fair trading acts;

Breaching Party means the party breaching a Contract as specified in clause 17;

Business Day means any day except a bank or public holiday in Victoria or a Saturday or Sunday;

Change Confirmation has the meaning given in clause 2.13;

Collateral has the meaning given in clause 12.3;

Company means Ameropa Australia Pty Ltd ABN 21 009 504 394 trading as Brown's Fertilisers and its successors and assigns;

Company Default Event means a Company Default Event as specified in clause 15;

Confidential Information means any information in any form which includes:

- (a) the existence of and the terms of these Conditions; and
- (b) all information, know-how, ideas, concepts, technology, industrial, marketing and commercial knowledge of a confidential nature (whether in tangible or intangible form) relating to or developed in connection with or in support of the business of a party or a Related Party of a party which is disclosed, communicated or delivered to, learnt by, or which otherwise comes to the knowledge of or into the possession of the other party under or in connection with these Conditions;

Consumer has the meaning given to it in section 3 of the Australian Consumer Law;

Consumer Guarantee means a right or guarantee under the Australian Consumer Law that cannot lawfully be excluded;

Contract means an agreement formed between the Company and the Customer for the supply by the Company of Products and/or Services to the Customer, comprising the following:

- (a) for Customers purchasing from the Company's list price:
 - (i) the price for the relevant Product(s) and/or Services set out in that list price; and
 - (ii) these Conditions;
- (b) for Customers who have been provided with a Quotation by the Company and have accepted the Quotation:
 - (i) the price provided in that Quotation; and
 - (ii) these Conditions; and
- (c) for all Customers:
 - (i) the Product(s) and/or Services being supplied by the Company;
 - (ii) the quantity of Product(s) being sold under the Contract;
 - (iii) additives or treatments applied (if any) and rate of application;
 - (iv) the Customers details;
 - (v) the Company's details;
 - (vi) Delivery location;
 - (vii) Delivery date;
 - (viii) payment terms; and
 - (ix) the date of Contract,

and, in the case of any Customer that has a credit account with the Company, includes the Credit Application including its associated terms and conditions;

Customer means the purchaser of the Products and/or Services;

Customer Default Event means a Customer Default Event as specified in clause 15;

Customer Related Entities means any Related Body Corporate or Related Party to the Customer;

Credit Application means a credit application submitted by the Customer to the Company, in a form required by the Company;

Defaulting Party means the party that defaults as specified in clause 15;

Default Event means a default event as specified in clause 15;

Default Notice means a default notice as specified in clause 15;

Delivery means delivery of the Products and/or performance of the Services in accordance with clause 10, and **Deliver** has a corresponding meaning;

Dispute has the meaning given in clause 19.1;

Dispute Notice has the meaning given in clause 19.2;

Fair Market Price means:

- (a) the price per tonne, ascertained by bona fide transactions for products the same as or similar to the Products (in specification and in quantity) which is actively trading on the Delivery date; or
- (b) where there is no active trade at the relevant time, the bona fide price being offered by other sellers in the marketplace for products the same as or similar to the Products on the Delivery date; or

- (c) where there is no active trade at the relevant time, the price being offered by other sellers in the marketplace for products the same as or similar to the Products on the Business Day following the giving of notice pursuant to clause 15, if that day is within the Delivery date or (where there are a series of Delivery dates) the last applicable Delivery date;

Force Majeure Event means an act of God; war, revolution or any other unlawful act against public order or authority; an industrial dispute including strike or other labour disturbances; a governmental restraint; a shortage, unavailability or delay in supply of raw materials, production capacity or transportation; any inclement weather (including any weather conditions and/or incidents that prevent or hinder the provision of Products and Services in accordance with these Conditions, including but not limited to flood and/or fire); an epidemic or pandemic and any other event not within the reasonable control of a party;

GST has the same meaning as it does in Section 195-1 of the GST Act;

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

Indemnified Party means the indemnified party as specified in clause 14.1;

Indemnifying Party means the indemnifying party as specified in clause 14.1;

Insolvency Event means the happening of any of these events:

- (a) a party suspends payment of its debts generally, is or becomes unable to pay its debts when they are due, or is or becomes unable to pay its debts within the meaning of the Corporations Act 2001 (Cth);
- (b) a party enters into, or resolves to enter into, any arrangement, composition or compromise with, or assignment for the benefit of, its creditors or any class of them;
- (c) a receiver, receiver and manager, liquidator, provisional liquidator, administrator, trustee or similar official is appointed over any of the assets or undertakings of a party, an application or order is made for the winding up or dissolution of a party, or a resolution is passed or any steps are taken to pass a resolution for the winding up or dissolution of a party, except for the purpose of an amalgamation or reconstruction which has the other party's prior consent;
- (d) a party goes bankrupt; or
- (e) a party ceases, or threatens to cease, to carry on business;

Intellectual Property Rights means:

- (a) inventions, discoveries and novel designs, whether or not registered or registrable as patents or designs, including developments or improvements of equipment, products, technology, processes, methods or techniques;
- (b) copyright (including future copyright) throughout the world in all literary works, artistic works, computer software and any other works or subject matter in which copyright subsists and may in the future subsist;
- (c) confidential information and trade secrets;
- (d) trade and service marks (whether registered or unregistered), business names, trade names, domain names, logos and get-up; and
- (e) proprietary rights;

Loss means any direct losses, liabilities, damages, costs, interest, charges, fines, penalties or expenses (including lawyer's fees and expenses on a full indemnity basis);

Materials means materials (such as seeds) provided by the Customer;

National Australia Bank Business Finance Base Rate means the business finance base rate as published on the National Australia Bank website, and where the business finance base rate is no longer published, will refer instead to the National Australia Bank base rate for unsecured business lending;

Non-Defaulting Party means the non-defaulting party as specified in clause 15;

Non-Excludable Rights has the meaning as specified in clause 13.1;

Order means an order for Products and/or Services submitted by the Customer to the Company under and in accordance with a Contract, which may include information such as the relevant dispatch locations, dates, and volumes for Products and/or Services, provided they are in line with the relevant Contract;

Original Delivery Date has the meaning given in clause 10.2;

Other Losses means the losses as specified in clause 16;

Personal Information means information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- (a) whether the information or opinion is true or not; and
- (b) whether the information or opinion is recorded in a material form or not, or as otherwise defined by the *Privacy Act 1988* (Cth);

PPSA has the meaning given in clause 12.1;

Price means the price of the Products and Services as specified in clause 8;

Products means all products sold by the Company to the Customer;

Professional Services means any agronomy services provided by the Company to the Customer;

Qualifying Event means a weather event (or the effects of a weather event) outside of a party's reasonable control;

Quotation means an offer (in writing or verbal) by the Company to the Customer to make a volume of Product and/or particular Services available to the Customer at the Price and for a specified period based on specified dispatch locations;

Related Body Corporate has the meaning provided in the *Corporations Act 2001* (Cth);

Related Party has the meaning provided in the *Corporations Act 2001* (Cth);

Remedy Period means a period of time which a Defaulting Party is provided to remedy a Default Event under clause 15, which must not be less than five (5) Business Days and must not exceed twenty (20) Business Days;

Representatives means officers, directors, employees, agents, representatives, contractors and/or subcontractors of the relevant party but a party to the Contract and its officers, directors, employees, agents, representatives, contractors and subcontractors are not "Representatives" of the other party to these Conditions;

Resolution Institute means the Resolution Institute (ACN 008 651 232);

Resolution Institute Rules means the Resolution Institute Arbitration Rules 2023 published by the Resolution Institute, and available at <https://resolution.institute/Web/Public-In-Dispute/Rules-and-Regulations/Resolution-Institute-Arbitration-Rules-2023.aspx>;

Savings has the meaning given in clause 16;

Services means the services to be supplied by the Company under these Conditions and includes Professional Services; and

Terminating Party means the party terminating a Contract as specified in clause 17.

2. Application of Conditions

- 2.1 These Conditions apply to all supplies and sales of Product and/or Services by the Company to the Customer unless otherwise agreed in writing by the parties.
- 2.2 The Customer will be deemed to have accepted these Conditions and a Contract will be formed when the Customer:
 - (a) accepts a Quotation by SMS or email correspondence with one of the Company's sales Representatives within the timeframe for acceptance stipulated in such Quotation;
 - (b) confirms their acceptance to the Quotation on a telephone call or at a meeting with one of the Company's sales Representatives; or
 - (c) confirms to the Company the details of the Contract and that it wishes to purchase Products at the list price.
- 2.3 For the avoidance of doubt, the Customer will receive (or be provided with access to) these Conditions prior to acceptance as stated in this clause.
- 2.4 The Company reserves the right to require written confirmation from a Customer of any Order placed verbally by a Customer or any verbal Quotation made by the Company.
- 2.5 The Company reserves the right to reject any Order that is not consistent with the Contract or which otherwise contains additional terms and conditions to those set out in the Contract.
- 2.6 The Customer is responsible to the Company for ensuring the accuracy of any Order submitted by the Customer.
- 2.7 For the avoidance of doubt, the Contract may comprise one or more Orders (i.e. the Contract may relate to a single Delivery of Products and/or Services, or may involve the purchase of a volume of Product to be Delivered on multiple dates over a period of time).
- 2.8 The Company will deliver the Products and/or perform the Services in accordance with each Contract (including any accepted Order under the Contract).
- 2.9 The quantity, quality, nature and description of the Products and/or Services shall be those set out in the Contract and accepted Order(s) (as applicable).
- 2.10 The Customer must:
 - (a) provide any information reasonably requested by the Company;
 - (b) ensure the accuracy of any information provided to the Company; and
 - (c) provide access to its premises as reasonably requested by the Company, to enable the Company to perform the Services in accordance with each Contract and accepted Order(s) (as applicable).
- 2.11 The Customer acknowledges and agrees that the Company will rely on any information the Customer provides as referred to in clause 2.10(a) to perform the Services.
- 2.12 Except in respect of any Consumer Guarantees or any other rights that the Customer may have under Australian Consumer Law, these Conditions state all of the express terms of the agreement between the parties in respect of its subject matter. They supersede all prior discussions, negotiations, understandings, and agreements in respect of its subject matter.
- 2.13 The Customer may request a change or changes to a Contract or an accepted Order (by email or by phoning one of the Company's sales Representatives). The Company will use its best endeavours to accommodate changes requested by the Customer. On receipt of such request, acting reasonably, the Company will either advise that the change is not accepted (in which case the Contract or Order (as relevant) will remain the same) or will confirm the change including any applicable change to the Price (in each case, such confirmation will be provided to the Customer by email to the email address of the change initiator) (**Change Confirmation**). The Customer must notify the Company within 2 business hours of receipt of the Change Confirmation of any error or inaccuracy in the Change Confirmation, or if it does not wish to proceed with the Change Confirmation in which case the Contract or Order (as relevant) will

remain unchanged. Otherwise, the Contract or Order (as relevant) will be deemed to be varied with reference to the details set out in the Change Confirmation.

3. **Customer Related Entities**

- 3.1 The Customer enters into a Contract on its own behalf and as agent for any Customer Related Entity (where relevant).
- 3.2 The Company will supply any Customer Related Entity with the Products and/or Services as instructed by the Customer, but at all times subject to the Contract.
- 3.3 Except where the context requires otherwise, references in these Conditions to the Customer are references to the Customer in its own right as recipient of the Products and/or Services and as agent of any Customer Related Entity (as relevant).
- 3.4 The parties acknowledge and agree that the Customer is liable for the acts and omissions of any Customer Related Entity in connection with these Conditions as if they were the acts and omissions of the Customer under this Agreement, including for the payment for any Products and/or Services.

4. **Blending or mixing**

- 4.1 If the Customer wishes to provide Materials to the Company for blending or mixing with Products, it must notify the Company and provide details to the Company by contacting one of the Company's sales Representatives.
- 4.2 The Company reserves the right to reject any request to provide Materials for blending or mixing with Products, and to impose additional costs and charges on top of the Price to carry out the blending and mixing, as notified to the Customer prior to the costs or charges being applied.
- 4.3 If the Company approves a request for blending or mixing Materials with the Products, the Customer must notify the Company of the anticipated date of delivery of the Materials to the Company, which must be no later than 48 hours before any anticipated collection by the Customer.
- 4.4 The Customer must deliver the Materials:
 - (a) to the Company's premises;
 - (b) at a time and date mutually convenient and agreed by the parties, taking into consideration the Customer's preferred delivery date provided under clause 4.3; and
 - (c) in accordance with the Company's reasonable directions.
- 4.5 The Customer acknowledges that clauses 4.3 and 4.4 are subject to clause 10.
- 4.6 The Customer acknowledges:
 - (a) in relation to seeds, that oat seeds, wheat seeds and barley seeds will not be accepted by the Company for blending or mixing;
 - (b) it is the Customer's responsibility to ensure that all Materials are packed, labelled, marked and stored (in bag or container) appropriately, including labelled with the following information:
 - (i) the Customer's name;
 - (ii) date of delivery to the Company's premises; and
 - (iii) any additional instructions about the Materials as applicable for the Contract.
- 4.7 The Company will keep a record of its receipt of the Materials (and may require the Customer to sign that record).
- 4.8 The Customer acknowledges, represents and warrants that:
 - (a) the Company is not responsible for:
 - (i) premixing and/or pre-batching Materials;
 - (ii) the length of time the Materials are on the Company's premises prior to blending or mixing;
 - (iii) delays in blending or mixing the Materials;
 - (iv) if the Materials are or comprise seeds, failed germination;
 - (v) contamination of Materials;
 - (vi) length of time Materials are blended or mixed in the Products; or
 - (vii) the performance, success or result of the Materials being blended or mixed;
 - (b) the Customer is responsible for the Materials including:
 - (i) premixing and/or pre-batching of Materials;
 - (ii) if the Materials are or comprise Seeds, failed germination; and
 - (iii) contamination to the Materials and any other products or property; and
 - (c) the Customer must not use single trip bags to deliver Materials to the Company;
 - (d) any information supplied by or on behalf of the Customer to the Company for the purpose of blending or mixing Materials is, to the best of its knowledge, true and correct; and
 - (e) it has made its own investigations as to whether any Materials are reasonably fit for any purpose for which they are supplied.

5. **Quantity of Product delivered**

- 5.1 The Company and the Customer acknowledge and agree that logistical issues on Delivery of the Products (such as truck size limits) may impact the exact quantity of Products (and any applicable Materials) supplied to the Customer in respect of the relevant Contract.
- 5.2 Where a logistical issue referred to in 5.1 applies, if reasonably required, the Company may vary the quantity of the Product Delivered to the Customer by up to two percent (2%) of the total quantity of Product ordered under the relevant Contract, and in doing so, subject to clause 5.3, the parties will still meet the requirements of the relevant Order and Contract.

- 5.3 The amount payable will be adjusted on a pro-rata basis where clause 5.2 applies to ensure the Customer only pays for the amount of Product it receives. For example, if a Contract relates to the purchase of 100 tonnes of DAP and the Company delivers 98 tonnes, the amount payable will be reduced to reflect the two tonnes that were not Delivered.
- 5.4 The Customer acknowledges that if the Customer is providing Materials for blending or mixing under these Conditions, that the Materials will form part of the total quantity for Delivery. If the Customer is collecting the Products (including Products blended or mixed with Materials), the Customer must ensure its vehicle or container is sufficient for the total quantity.
6. **Weight of Product delivered**
The Delivery weight used to calculate the Price will be determined by the Company in accordance with the weight recorded for the Product on its registered weighbridge.
7. **Cancellation**
Unless agreed in writing by the Company, if the Customer cancels an Order or the Contract prior to the Delivery of all of the Products covered by that Contract, this amounts to a Customer Default Event, and the consequences as set out in clause 16 apply.
8. **Price**
- 8.1 Subject to clause 8.2, the price of the Products and Services shall be as per the Contract.
- 8.2 The Company reserves the right, by notice to the Customer at any time before Delivery, to increase the price of the Products and/or Services to reflect any actual increase in costs to the Company due to any change in Delivery dates, Delivery location, quantities or specifications for the Products requested by the Customer, or any delay caused by instructions of the Customer or failure of the Customer to give the Company adequate information or instructions in respect of the relevant Contract.
- 8.3 Subject to clause 10.3, the Price includes all freight and Delivery costs.
- 8.4 Prices of Products are calculated on a per tonne basis and are rounded to the nearest whole cent. When quantities other than 1 tonne (whether more or less than a tonne) are supplied there may be a slight rounding difference in the price of a few cents per tonne (either up or down, as appropriate).
- 8.5 All Prices quoted are exclusive of GST unless otherwise stated.
9. **Terms of payment**
- 9.1 Customers are required to pay cash before Delivery, except where the Customer has an approved Credit Application.
- 9.2 Clauses 9.3 to 9.5 only apply to Customers with an approved Credit Application.
- 9.3 Subject to any special payment terms shown in the Contract or otherwise agreed between the Customer and Company, the Company shall be entitled to invoice the Customer for the amount payable once the Products have been Delivered and/or the Services have been performed (as applicable).
- 9.4 The Customer must pay such invoice within thirty (30) days after the end of the month in which the Customer receives the Company's tax invoice.
- 9.5 If the Customer fails to make any payment on the due date or if the Customer's credit limit will be exceeded by a supply, then without prejudice to any other right or remedy available to the Company, the Company may:
- (a) until payment is made / the credit limit is no longer exceeded:
- (i) suspend any further Deliveries to the Customer;
- (ii) discontinue the performance of any Services; and
- (b) charge the Customer interest on the unpaid amount at a rate of 2% above the National Australia Bank Business Finance Base Rate. Such interest will accrue from the date payment was due to the date payment is made, will be calculated daily and capitalised monthly and must be paid by the Customer on demand by the Company.
- 9.6 If the Company takes steps or action to recover any amount due to it, the Company may charge the Customer for any reasonable costs of collection of any debt owing by the Customer to the Company.
10. **Delivery**
- 10.1 Delivery of the Products shall be made by either:
- (a) the Company delivering the Products to the Customer's premises; or
- (b) the Customer collecting the Products from the Company's premises after the Company has notified the Customer that the Products are ready for collection.
- 10.2 The Company shall use its best endeavours to deliver the Products by the quoted Delivery date (**Original Delivery Date**). Where possible, the Company will also endeavour to offer to deliver the Products before the Original Delivery Date, which will only occur with agreement from the Customer. The Company may request to adjust the Original Delivery Date to a later date where a delay is caused by a factor beyond the Company's reasonable control. In such circumstances, the Company will provide the Customer with as much notice as possible about the delay, and both parties will use their best endeavours to discuss and agree (acting reasonably) a new Delivery date (**Adjusted Delivery Date**).

- 10.3 The Customer must reimburse the Company for any actual and reasonable costs incurred as a consequence of the Customer's failure to accept Delivery under the Contract if the Customer does not take Delivery of Products on the Original Delivery Date, any other date agreed in a Change Confirmation under clause 2.13 or on any Adjusted Delivery Date (thereby taking Delivery at a later date). Such amount will be payable in addition to the Price.
- 10.4 For the avoidance of doubt, the actual and reasonable costs referred to in clause 10.3 include but are not limited to costs associated with re-delivery and/or storage, as applicable.
- 10.5 Other than for Products that are in liquid form, the Customer acknowledges that the Product consists of variable sized material and may segregate when unloaded into storage, particularly when belt conveyors and augers are used during Delivery.
- 10.6 The Company will not be liable to the Customer in respect of Product quality changes as a result of segregation, whether occurring prior to, during Delivery or otherwise.
- 10.7 Both parties must comply at all times with all laws in connection with these Conditions, including without limitation laws in respect to occupational health and safety. Both parties warrant and represent that they and their personnel (including without limitation employees, contractors and subcontractors) have been trained in respect of all applicable occupational health and safety requirements and have processes and procedures in place to ensure compliance with such requirements.
11. **Title and risk**
- 11.1 Risk of damage to or loss of the Products shall pass to the Customer:
- (a) in the case of Products delivered at the Customer's premises, at the time the Products are unloaded from the Company's delivery vehicle; and
 - (b) in the case of Products collected by the Customer from the Company's premises, at the time when the Products have been loaded onto the Customer's vehicle.
- 11.2 Notwithstanding Delivery and the passing of risk in the Products on Delivery, the property and ownership of the Products shall not pass to the Customer until the Company has received in cleared funds, payment of the Price in full.
- 11.3 Upon Delivery, all Products are handled and stored at the risk of the Customer and Company accepts no liability in this regard.
- 11.4 Where Services for the spreading of Products have been requested but will not be performed immediately on/after Delivery, the Company will provide the Customer with information and guidance to assist the Customer to safely and securely store the Products until such services are performed.
- 11.5 The Company's rights under this clause 11 secure the Company's right to receive the amount payable for the Products.
- 11.6 Until full property and ownership in the Products passes to the Customer in accordance with clause 11.2:
- (a) the Customer must keep the Products separate from all other goods except as is expressly consented to by the Company in writing from time to time;
 - (b) the Customer must keep the Products properly stored, protected and identified as the Company's property;
 - (c) the Customer must not sell the Products unless in the ordinary course of the Customer's business;
 - (d) the Company may at any time require the Customer to deliver up the unpaid Products to the Company and, if the Customer fails to do so immediately, to enter the premises of the Customer or any third party where the Products are stored and taking reasonable care, repossess the Products;
 - (e) the Customer agrees that the Company is authorised to enter any premises where the Products are located and the Customer will indemnify the Company against all claims, damages or other losses of whatever nature suffered by the Company as a consequence of recovering or attempting to recover the Products (provided the Company takes reasonable care in doing so); and
 - (f) the Customer holds and agrees to hold the proceeds of any sale, lease or other dealing of the Products for the Company in a separate bank account with a bank to which the Customer has not given any security.
12. **Application of the PPSA**
- 12.1 In this clause, **PPSA** means the *Personal Property Securities Act 2009* (Cth). If a term used in this clause has a particular meaning in the PPSA, it has the same meaning in this clause.
- 12.2 This clause applies to the extent that the Company's interest in any Products is a security interest.
- 12.3 The Customer agrees that the security interest is over the Products, any proceeds of the Products, and any product or mass that the Products may be or become part of. The Products, proceeds and product or mass are referred to in this clause collectively as the **Collateral**.
- 12.4 The Customer acknowledges that the Company may register a financing statement in relation to its

- security interest. The Customer waives its right under section 157 of the PPSA to receive notice of any verification statement relating to the registration of any such financing statement or any related financing change statement.
- 12.5 The Company can apply amounts it receives from the Customer towards amounts owing by the Customer to the Company in such order as the Company chooses.
- 12.6 The Company and the Customer agree not to disclose information of the kind mentioned in section 275(1) of the PPSA, except in the circumstances required by sections 275(7) (b) to (e) of the PPSA. The Customer agrees that it will only authorise the disclosure of information under section 275(7) (c) or request information under section 275(7) (d) of the PPSA if the Company approves. Nothing in this clause will prevent any disclosure by the Company that it believes is necessary to comply with its other obligations under the PPSA.
- 12.7 To the extent that it is not inconsistent with clause 12.6 constituting a "confidentiality agreement" for the purposes of section 275(6)(a) of the PPSA, the Customer agrees that the Company may disclose information of the kind mentioned in section 275(1) of the PPSA to the extent that the Company is not doing so in response to a request made by an "interested person" (as defined in section 275(9) of the PPSA) pursuant to section 275(1) of the PPSA.
- 12.8 If the Customer defaults in the timely performance of any obligation owed to the Company, the Company may enforce its security interest by repossessing and reselling the Collateral, or by exercising all or any of its rights under these Conditions, the general law and the PPSA. To the extent that Chapter 4 of the PPSA would otherwise apply to an enforcement by the Company of its security interest, the Customer and the Company agree that the following provisions of the PPSA do not apply:
- (a) to the extent that s 115(1) of the PPSA allows them to be excluded: ss 95, 118, 121(4), 125, 130, 132(3)(d), 132(4), 135, 138B(4), 142 and 143; and
 - (b) in addition, to the extent that section 115(7) of the PPSA allows them to be excluded: ss 127, 129(2) and (3), 132, 134(2), 135, 136(5) and 137.
- 12.9 The Customer must promptly do anything the Company requires to ensure that the Company's security interest is perfected and has priority over all other security interests.
- 12.10 Nothing in this clause is limited by any other provision of these Conditions or any other agreement between the Company and the Customer. Nothing in this clause limits the Company's rights or the Customer's obligations apart from under this clause.
13. **Liability**
- 13.1 **Non-Excludable Rights**
- (a) Nothing in this agreement is intended to have the effect of excluding:
- (i) any Consumer Guarantees; or
 - (ii) any other applicable Law that cannot be excluded, restricted or modified by agreement of the parties,
- (collectively **Non-Excludable Rights**).
- 13.2 To the extent permitted by law:
- (a) the Company is not liable for or in respect of any Materials provided by the Customer, and in connection with any blending or mixing services carried out by the Company (which the Customer acknowledges the Company does at the request of the Customer and without any warranty or representation as to the Company's capability or expertise in doing so), except to the extent resulting directly from any advice provided to the Customer in the provision of Professional Services by the Company; and
 - (b) the parties release each other from any liability for legal costs and disbursements and, without limitation, any indirect or consequential expense, loss or damage, loss of profits, revenue, use, expectation, or opportunity, wasted expenditure, lost production or similar losses suffered by either party under or in connection with these Conditions.
- 13.3 To the extent permitted by law, the Company's liability for breach of any Non-Excludable Rights is limited at the Company's option:
- (a) in the case of Products:
 - (i) resupplying the Products;
 - (ii) replacing the Products;
 - (iii) repairing the Products;
 - (iv) payment of the cost of replacing or of acquiring equivalent Products; or
 - (v) where the Customer is not a Consumer, provision of a credit note in respect of the value of the Products.
 - (b) in the case of Services:
 - (i) supplying of the Services again; or
 - (ii) the payment of the cost of having the Services supplied again.
- 13.4 The Company's liability in respect of a breach of or a failure to comply with an applicable Consumer Guarantee will not be limited in the way set out in clause 13.3 if:
- (a) the Goods or the Services supplied are goods or services 'of a kind ordinarily acquired for personal, domestic or household use or consumption', as that expression is used in section 64A

- of the Australian Consumer Law;
 - (b) it is not 'fair or reasonable' for the Seller to rely on such limitation in accordance with section 64A(3) of the Australian Consumer Law; or
 - (c) the relevant Consumer Guarantee is a guarantee pursuant to sections 51, 52 or 53 of the Australian Consumer Law.
- 13.5 It is the responsibility of the Customer to (as soon as possible after Delivery) verify for itself that the quantity and type of Products supplied (and any blending or mixing of Materials) is in accordance with the Contract.
- 13.6 Due to the nature of the Products, any claim for short or wrongful supply of Products must be notified by the Customer to the Company within fourteen (14) days of Delivery.
- 13.7 The Customer must, give the Company notice of any defective Services within fourteen (14) days after the relevant Service has been performed.
- 13.8 Subject to any Non-Excludable Right, each party's maximum liability under or in connection with each Contract will be the Price paid for the Product under that Contract.
- 13.9 Nothing in these Conditions excludes or limits the liability of each party for:
- (a) death or personal injury caused by its negligence or that of its employees, agents or contractors;
 - (b) fraud or fraudulent misrepresentation; or
 - (c) any other liability that cannot be excluded or limited by applicable law.
14. **Indemnity**
- 14.1 Each party (**Indemnifying Party**) indemnifies the other party and its Representatives (**Indemnified Party**) against any Loss which the Indemnified Party suffers, incurs or is liable for in connection with the Contract including, but not limited to:
- (a) any act or omission of the Indemnifying Party or its Representatives in connection with a Contract;
 - (b) any infringement of the Indemnified Party's Intellectual Property Rights including any failure to comply with clause 23.2 by the Indemnifying Party; and
 - (c) any breach of the Contract by the Indemnifying Party.
- 14.2 The Customer indemnifies the Company against any Loss which the Company suffers, incurs or is liable for in circumstances where the Customer has provided Materials for blending or mixing with Products:
- (a) any contamination of or damage to the Materials or any Products or other products, raw materials, ingredients, chemicals, or goods;
 - (b) injury to or death of any of the Customer or the Company's Representatives; or
 - (c) damage to or destruction of any Products or property.
- 14.3 Each party holds the benefit of the indemnity in clause 14.1 on trust for its Representatives.
- 14.4 The indemnity in clause 14.1 will not apply to the extent that any Loss is caused or contributed to by the Indemnified Party.
15. **Default**
- 15.1 In this clause 15, a Default Event is:
- (a) the failure of the Company to Deliver the Product(s) or perform the Service(s) by, as applicable, the Original Delivery Date(s), a revised Delivery date agreed pursuant to a Change Confirmation under clause 2.13, or any Adjusted Delivery Date, except where a Qualifying Event has occurred (**Company Default Event**); or
 - (b) the cancellation of an Order or Contract under clause 5, including the cancellation of any Services not yet performed, or performed in part, and/or the failure of the Customer to take Delivery of the Product(s) or Services by, as applicable, the Original Delivery Date, a revised Delivery date agreed pursuant to a Change Confirmation under clause 2.13 or any Adjusted Delivery Date, except where a Qualifying Event has occurred (**Customer Default Event**).
- 15.2 If a party (**Defaulting Party**) becomes aware of a Default Event in relation to its own obligations, or a potential Default Event, they agree to notify the other party (**Non-Defaulting Party**) as soon as reasonably practicable on becoming aware of the Default Event (**Default Notice**).
- 15.3 If the Default is capable of remedy, a Default Notice issued under clause 15.2 must specify how the Defaulting Party will remedy the Default Event and the applicable Remedy Period.
- 15.4 If the Default Event is incapable of remedy, or the Defaulting Party does not remedy the default within the Remedy Period, then the Non-Defaulting Party may terminate the Contract and the financial consequences set out in clause 16 will apply.
16. **Financial Consequences of default**
- 16.1 Unless otherwise stated in the Contract and subject always to any other express term set out in these Conditions:
- (a) in the case of a Customer Default Event:
 - (i) if the Fair Market Price has fallen below the Price, the Customer must pay within seven (7) Business Days of demand by the Company, an amount equal to the undelivered quantity of the Product multiplied by the difference between the Price and the Fair Market Price of the Product;

- (ii) if the Fair Market Price has risen above the Price (the difference being the **Additional Profits**) no compensation is payable by the Customer to the Company, other than as allowed for in clause 16.3; and
 - (iii) in addition to (i) or (ii) above, the Customer must reimburse the Company for any actual and reasonable costs incurred as a consequence of the Customer's cancellation of any Services (whether not yet performed, or performed in part).
 - (b) in the case of a Company Default Event:
 - (i) if the Fair Market Price has risen above the Price, the Company must pay within seven (7) Business Days of demand by the Customer, an amount equal to the undelivered quantity of the Product multiplied by the difference between the Price and the Fair Market Price of the Product; and
 - (ii) if the Fair Market Price has fallen below the Price (the difference being the **Savings**) no compensation is payable by the Company to the Customer, other than as allowed for in clause 16.3.
- 16.2 Where either party is dissatisfied with the ascertained Fair Market Price calculated in accordance with its definition and an alternative price cannot be mutually agreed, then the determination of Fair Market Price may be referred by either party for determination under clause 19;
- 16.3 In addition to any losses recoverable under clause 16.1 above, the Non-Defaulting Party will also be entitled to claim any of the following losses:
 - (a) costs for extended storage;
 - (b) handling costs;
 - (c) transport costs;
 - (d) interest costs; and
 - (e) yield loss,
 (collectively **Other Losses**).
- 16.4 Such Other Losses must be reasonable.
- 16.5 Subject to clause 16.6, the Non-Defaulting Party must provide evidence of Other Losses suffered as a result of a default:
 - (a) at the time of issuing the Default Notice; or
 - (b) within five (5) Business Days of that evidence becoming available, but no more than twenty (20) Business Days from the Default Event, whichever is earlier.
- 16.6 Where appropriate, the parties may specify, by way of liquidated damages, the amount of Other Losses that may be recoverable by one or both parties. The parties agree that such an amount will be a genuine pre-estimate of the loss that a party (or both parties) will incur as a result of a default and will not constitute a penalty.
- 16.7 Where:
 - (a) in the case of a Customer Default Event, there has been Additional Profits; and
 - (b) in the case of a Company Default Event, there has been Savings,
 then the Non-Defaulting Party can only claim for the Other Losses to the extent that the Other Losses exceed the Additional Profits or Savings (as the case may be).
- 17. **Termination**
- 17.1 Either party (**Terminating Party**) may immediately terminate the Contract (including all accepted Orders) by written notice to the other party if the other party (**Breaching Party**):
 - (a) cannot or does not remedy a Default Event, as set out in clause 15.4; or
 - (b) breaches the Contract in a material respect and, in the reasonable opinion of the Terminating Party, the breach:
 - (i) cannot be remedied; or
 - (ii) can be remedied, but is not remedied by the Breaching Party within five (5) Business Days after the Terminating Party gives the Breaching Party notice of the breach; or
 - (c) suffers an Insolvency Event.
- 17.2 Within five (5) Business Days of the date of expiry or termination of the Contract, each party must return all Confidential Information of the other party.
- 17.3 If the Contract is terminated under this clause 17.1 by the Company, the Company will have an immediate right to payment for all amounts owing by the Customer, in respect of the Products and Services Delivered and/or supplied up to the date of termination together with all other debts owing by the Customer to the Company which will become due and payable and must be paid by the Customer on demand and the Company may do any one or more of the following:
 - (a) suspend indefinitely all further deliveries of Products in respect of any Orders being processed for delivery and cancel any Order or refuse to accept any further Orders;
 - (b) cancel any credit facility provided to the Customer;
 - (c) require the return of all Products the property in, and ownership of, has not passed in accordance with clause 11, where such Products have not been paid for by the Customer; and
 - (d) exercise its rights under clause 11.6(e) to enter the Customer's premises wherever situated without impediment, and with the full co-operation and assistance of the Customer, to locate, retrieve and take possession of Products held by the Customer, where such Products have not

- been paid for by the Customer.
- 17.4 If the Contract is terminated under this clause 17 by the Customer, on request by the Customer, the Company must fulfil any outstanding Orders in respect of which the Customer has already paid. Alternatively, the Customer may request a refund of any amounts paid in respect of any unfulfilled Orders, which the Company must pay on demand.
- 17.5 Termination shall be without prejudice to any other rights or remedies the Terminating Party may have under law or equity.
18. **Cancellation of Material blend**
- 18.1 On termination of a Contract, the Customer must collect any Materials provided to the Company for blending or mixing that have not yet been blended or mixed within ten (10) Business Days of notification by the Company.
- 18.2 If the Customer does not collect the Materials under this clause 18, the Company may dispose of the Materials in any manner it sees fit.
- 18.3 The Customer is not entitled to cancel an Order if Materials provided by the Customer have already been blended or mixed at the time of cancellation.
19. **Disputes and arbitration**
- 19.1 Any dispute, disagreement or claim relating to these Conditions (**Dispute**) will be dealt with in accordance with this clause.
- 19.2 The party claiming the Dispute will give notice of the Dispute to the other party which will include all facts on which that party relies in relation to that Dispute (**Dispute Notice**).
- 19.3 Within five (5) Business Days after service of a Dispute Notice, representatives of each party will meet at least once to attempt, using their reasonable endeavours, to resolve the Dispute in good faith.
- 19.4 If the Dispute has not been resolved within fifteen (15) Business Days after the service of the Dispute Notice, the Dispute shall be submitted to and settled by arbitration in accordance with the Resolution Institute Arbitration Rules 2023.
- 19.5 The Resolution Institute Arbitration Rules 2023 form part of these Conditions.
- 19.6 Except in relation to any applications for urgent injunctive relief, neither party will bring any action or other legal proceedings against the other in respect of a Dispute until arbitrated in accordance with the Resolution Institute Arbitration Rules 2023.
20. **Important safety information**
- The Customer acknowledges and agrees that silos should not be used for storage of fertilisers. Silos used to store fertilisers have been known to collapse. This poses a risk to human safety and may lead to loss and damage of Product. The Company does not recommend storage of fertiliser in silos. Following Delivery, the Customer must take all appropriate safety precautions with respect to the Products including referencing all safety data sheets provided with the Products or available from the Company.
21. **Trusts**
- If a party enters into a Contract as a trustee of a trust, that party and its successors as trustee of the trust will be liable under the Contract in its own right and as trustee of the trust. Nothing releases the party from any liability in its personal capacity. The party warrants that at the date of the Contract:
- (a) all the powers and discretions conferred by the deed establishing the trust are capable of being validly exercised by the party as trustee and have not been varied or revoked and the trust is a valid and subsisting trust;
 - (b) the party is the sole trustee of the trust and has full and unfettered power under the terms of the deed establishing the trust to enter into and be bound by the Contract on behalf of the trust and that this Contract is executed and entered into as part of the due and proper administration of the trust and for the benefit of the beneficiaries of the trust; and
 - (c) no restriction on the party's right of indemnity out of or lien over the trust's assets exists or will be created or permitted to exist and that right will have priority over the right of the beneficiaries to the trust's assets.
22. **Confidentiality**
- The parties agree to keep confidential the Confidential Information and agree not to disclose any Confidential Information to any third party except where:
- (a) the Confidential Information is in, or acquired from, the public domain or, without fault of either party, it becomes within the public domain;
 - (b) the Confidential Information is required to be disclosed pursuant to the order of a court or by operation of law; or
 - (c) disclosure of the Confidential Information is necessary to perform or enforce a party's rights and functions under the Contract.

23. **Intellectual Property**

- 23.1 Each party remains the owner or licensee (as the case may be) of all Intellectual Property Rights owned or used by that party prior to the Contract being formed.
- 23.2 The parties agree that any Intellectual Property Rights created or developed under or in connection with the Contract or in the course of supplying the Products or Services are owned by the Company.

24. **Force Majeure**

Where a Force Majeure Event prevents or delays a party from performing any obligation under the Contract (including any accepted Order), that obligation (other than any obligation to pay) is suspended if the Force Majeure Event continues. Either party may terminate the Contract (including all accepted Orders) if a Force Majeure Event continues for more than ninety (90) Business Days.

25. **Privacy**

- 25.1 The Company will collect, use and disclose Personal Information about the Customer and any guarantor, in accordance with the Credit Application and the Company's Privacy Policy, which is available at http://www.brownsfert.com.au/wp-content/uploads/browns-fertilisers-privacy-policy_20161108.pdf.
- 25.2 The Customer and any guarantor must notify the Company if any of its Personal Information changes and consents to the Company collecting, using and disclosing this updated Personal Information in accordance with the Company's Privacy Policy.

26. **GST and other taxes and duties**

- 26.1 Words or expressions used in this clause 26 that are defined in the GST Act have the same meaning given to them in that Act.
- 26.2 Unless otherwise stated, any amount specified in the Contract (including any accepted Order) as the consideration payable for any taxable supply does not include any GST payable in respect of that supply.
- 26.3 If a party makes a taxable supply under the Contract (**Supplier**), then the recipient of the taxable supply (**Recipient**) must also pay, in addition to the consideration for that supply, the amount of GST payable in respect of the taxable supply at the time the consideration for the taxable supply is payable.
- 26.4 Despite anything stated in this clause, the Recipient is not obliged under the Contract to pay the amount of any GST payable until the Supplier provides it with a valid tax invoice for the taxable supply.
- 26.5 If an adjustment event arises in relation to a taxable supply made by a Supplier under the Contract, the amount paid or payable by the Recipient pursuant to clause 26.3 will be amended to reflect this and a payment will be made by the Recipient to the Supplier or vice versa as the case may be.
- 26.6 If a third party makes a taxable supply and the Contract requires a party to the Contract (the payer) to pay for, reimburse or contribute to (pay) any expense or liability incurred by the other party to that third party for that taxable supply, the amount the payer must pay will be the amount of the expense or liability plus the amount of any GST payable in respect thereof but reduced by the amount of any input tax credit to which the other party is entitled in respect of the expense or liability.

27. **Notices**

- 27.1 If either party gives or is required to give a notice to the other party under these Conditions, it must be in writing (by means including, but not limited to, hand delivered, email, or SMS).
- 27.2 A notice given in accordance with clause 27.1 is taken to be received if:
- (a) hand delivered, on delivery;
 - (b) sent via SMS or email, when the sender's system confirms that the notice has been sent but where that time is after 6.00pm in the place of receipt or on a day that is not a Business Day, then the notice is considered to have been given at 9.00am on the next Business Day.

28. **General**

- 28.1 These Conditions including each Contract are governed by the laws of Victoria. The parties submit to the non-exclusive jurisdiction of the courts of that State and courts entitled to hear appeals from those courts.
- 28.2 A reference to an Act includes regulations and other instruments made under it, and consolidations, amendments, re-enactments or replacements of any of them.
- 28.3 In these Conditions, the words 'include', 'including', 'for example', 'such as' or any form of those words or similar expressions do not limit what else is included and must be construed as if they are followed by the words 'without limitation' unless there is express wording to the contrary.
- 28.4 If a provision in these Conditions is wholly or partly void, illegal or unenforceable in any relevant jurisdiction that provision or part must, to that extent, be treated as deleted from this agreement for the purposes of that jurisdiction. This does not affect the validity or enforceability of the remainder of the

provision or any other provision of these Conditions.

- 28.5 If the Customer comprises more than one person:
- (a) the Contract binds each Customer jointly and severally; and
 - (b) the Company is only required to give notices, quotes and other information, to one of the Customers (who undertakes to provide the notices, quotes and information to the other Customer or Customers).
- 28.6 A waiver of any right arising under the Contract must be in writing and signed by the party granting the waiver.
- 28.7 The Company may amend these Conditions by providing thirty (30) days' written notice to the Customer. Any such amendment will not impact existing Contracts on foot. The Customer may choose not to proceed with any further Contract if it is not comfortable with the Conditions as varied.
- 28.8 The Company and the Customer are independent contracting parties and nothing in the Contract makes either party the agent or legal representative of the other or grants either party any authority to assume or create an obligation on behalf of the other.