

# TERMS AND CONDITIONS

## Payment terms

1. The terms of payment are strictly seven (7) days (or such other period as nominated by the supplier herein) from the date of invoice and payment is due and payable on that date. Athian Pty Limited ACN 053 275 344 trading as Midwest Foods, Athian Pty Ltd trading as GH Cole & Son, Athian Pty Ltd trading as Midwest Foods & Liquor and its related bodies corporate (as that term is defined in the *Corporations Act 2001 (Supplier)*) may, at any time, unilaterally vary the terms of trade in its absolute and unfettered discretion.
2. Should the Applicant not pay for the goods or services supplied by the Supplier in accordance with the credit terms as provided herein, or as agreed in writing by the Supplier from time to time, the Supplier will be entitled to charge an administration fee of:
  - (a) 10 percent of the amount of the invoice payable; and
  - (b) a further 10 percent per annum payable per year, or part thereof, until payment by the Applicant.

## Jurisdiction

3. The Applicant acknowledges and agrees that this agreement shall be governed by the laws of New South Wales, and the laws of the Commonwealth of Australia which are in force in New South Wales.
4. The Applicant acknowledges and agrees that any contract for the supply of goods or services between the Supplier and the Applicant is formed at the address of the Supplier.
5. The parties to this agreement submit to the non-exclusive jurisdiction of the courts of New South Wales and the relevant Federal Courts and Courts competent to hear appeals from those courts.

## Security/charges

6. The Applicant charges in favour of the Supplier all of its estate and interest in any real property that the Applicant owns at present and in the future with the amount (greater than \$5000) of its indebtedness hereunder until discharged.
7. The Applicant charges in favour of the Supplier all of its estate and interest in any personal property that the Applicant owns at present and in the future with the amount (greater than \$5000) of its indebtedness hereunder until discharged.
8. The Applicant appoints as its duly constituted attorney the Supplier's company secretary from time to time to execute in the Applicant's name and as the Applicant's act and deed any security interest, real property mortgage, bill of sale or consent to any caveat the Supplier may choose to lodge against any property (including real property) that the Applicant may own in any Land Titles Office in any state or territory of Australia, even though the Applicant may not have defaulted in carrying out its obligations hereunder.
9. Where the Applicant has previously entered into an agreement with the Supplier by which the Applicant has granted a charge, mortgage or other security over real or personal property, those charges, mortgages or other security interests will continue and co-exist with the obligations and security interests created in this agreement. The Supplier may, at its election, vary the terms of such previous charges, mortgages or other securities to reflect the terms herein.

## Purpose of credit

10. The Applicant acknowledges and agrees that the credit to be provided to the Applicant by the Supplier is to be applied wholly or predominantly for business or investment purposes (or for both purposes).
11. The credit facilities provided by the Supplier are not transferable by the Applicant without the prior written consent of the Supplier. The Supplier may assign this agreement to another party without prior notice to the Applicant. The Supplier will give the Applicant notice when the assignment has been effected.

## Formation of contract

12. Quotations made by the Supplier shall not be construed as an offer or obligation to supply in accordance with the quotation. The Supplier reserves the right to accept or reject, at its discretion, any offer to purchase received by it. Only written acceptance by the Supplier of the Applicant's offer shall complete a contract.
13. Placement of an order, either verbally or in writing, shall imply acceptance of the Supplier's offer and of these terms and conditions.

## Retention of title

14. Title in the goods does not pass to the Applicant until the Applicant has made payment in full for the goods and, further, until the Applicant has made payment in full of all other money owing by the Applicant to the Supplier (whether in respect of money payable under a specific contract or on any other account whatsoever).
15. Until payment in full has been made to the Supplier, the Applicant will hold the goods in a fiduciary capacity for the Supplier and agrees to store the goods in such a manner that they can be identified as the property of the Supplier, and shall not mix the goods with other similar goods.
16. The Applicant will be entitled to sell the goods in the ordinary course of its business, but until full payment for the goods has been made to the Supplier, the Applicant shall sell as agent and bailee for the Supplier and the proceeds of sale of the goods shall be held by the Applicant on trust for the Supplier absolutely.
17. The Applicant's indebtedness to the Supplier, whether in full or in part, shall not be discharged by the operation of clause 16 hereof unless and until the funds held on trust are remitted to the Supplier.
18. The Applicant agrees that whilst property and title in the goods remains with the Supplier, the Supplier has the right, with or without prior notice to the Applicant, to enter upon any premises occupied by the Applicant (or any receiver, receiver and manager, administrator, liquidator or trustee in bankruptcy of the Applicant) to inspect the goods of the Supplier and to repossess the goods which may be in the Applicant's possession, custody or control when payment is overdue.
19. The Applicant will be responsible for the Supplier's costs and expenses in exercising its rights under clause 18. Where the Supplier 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 Applicant against the Supplier, its employees, servants or agents.
20. The Applicant agrees that where the goods have been retaken into the possession of the Supplier, the Supplier has the absolute right to sell or deal with the goods, and if necessary, sell the goods with the trademark or name of the Applicant on those goods, and the Applicant hereby grants an irrevocable licence to the Supplier to do all things necessary to sell the goods bearing the name or trademark of the Applicant.

## Cancellation of terms of credit

21. The Supplier reserves the right to withdraw credit at any time, whether the Applicant is in default under the terms of this agreement or not.
22. Upon cancellation with or without notice all liabilities incurred by the Applicant become immediately due and payable to the Supplier.

## Indemnity

23. The Applicant agrees to indemnify the Supplier and keep the Supplier indemnified against any claim. This indemnity includes any legal fees and expenses the Supplier incurs in order to enforce its rights, on an indemnity basis.

## Provision of further information

24. The Applicant undertakes to comply with any request by the Supplier to provide further information for the purpose of assessing the Applicant's creditworthiness, including an updated credit application.
25. If the Applicant is a corporation (with the exception of a public listed company), it must advise the Supplier of any alteration to its corporate structure (for example, by changing directors, shareholders, or its constitution). In the case of a change of directors or shareholders the Supplier may ask for new guarantors to sign a guarantee and indemnity.

## Corporations

26. If the Applicant is a corporation, the Applicant warrants that all of its directors have signed this agreement and that all of its directors will enter into a guarantee and indemnity with the Supplier in relation to the Applicant's obligations to the Supplier.

## Trustee capacity

27. If the Applicant is the trustee of a trust (whether disclosed to the Supplier or not), the Applicant warrants to the Supplier that:
  - (a) the Applicant enters into this agreement in both its capacity as trustee and in its personal capacity;
  - (b) the Applicant has the right to be indemnified out of trust assets;
  - (c) the Applicant has the power under the trust deed to sign this agreement; and
  - (d) the Applicant will not retire as trustee of the trust or appoint any new or additional trustee without advising the Supplier.
28. The Applicant must give the Supplier a copy of the trust deed upon request.

## Partnership

29. If the Applicant enters into this agreement as partners, the Applicant warrants that all of the partners have signed this agreement and that all of the partners will enter into a guarantee and indemnity with the Supplier in relation to the Applicant's obligations to the Supplier.
30. If the Applicant is a partnership, it must not alter its partnership (for example, adding or removing partners or altering its partnership agreement) without advising the Supplier. In the case of a change of partners, the Supplier may ask for new guarantors to sign a guarantee and indemnity.

## Insolvency

31. If the Applicant becomes insolvent, the Applicant remains liable under this agreement for payment of all liabilities incurred hereunder. The Applicant remains liable under this agreement even if the Supplier receives a dividend or payment as a result of the Applicant being insolvent.

## Waiver

32. A waiver of any provision or breach of this agreement by the Supplier must be made by an authorised officer of the Supplier in writing. A waiver of any provision or breach of this agreement by the Applicant must be made by the Applicant's authorised officer in writing.
33. Until ownership of the goods passes, the Applicant waives its rights it would otherwise have under the PPSA:
  - (a) under section 95 to receive notice of intention to remove an accession;
  - (b) under section 118 to receive notice that the Supplier intends to enforce its security interest in accordance with land law;
  - (c) under section 121(4) to receive a notice of enforcement action against liquid assets;
  - (d) under section 129 to receive a notice of disposal of goods by the Supplier purchasing the goods;
  - (e) under section 130 to receive a notice to dispose of goods;
  - (f) under section 132(2) to receive a statement of account following disposal of goods;
  - (g) under section 132(4) to receive a statement of account if no disposal of goods for each 6 month period;
  - (h) under section 135 to receive notice of any proposal of the Supplier to retain goods;
  - (i) under section 137(2) to object to any proposal of the Supplier to retain or dispose of goods;
  - (j) under section 142 to redeem the goods;
  - (k) under section 143 to reinstate the security agreement; and
  - (l) under section 157(1) and 157(3) to receive a notice of any verification statement.

## Costs

34. The Applicant must pay for its own legal, accounting and business costs and all costs incurred by the Supplier relating to any default by the Applicant. The Applicant must also pay for all stamp duty and other taxes payable on this agreement (if any).
35. The Applicant will pay the Supplier's costs and disbursements incurred in pursuing any recovery action, or any other claim or remedy, against the Applicant, including debt recovery fees and legal costs on an indemnity basis. Such costs and disbursements will be due and payable by the Applicant to the Supplier irrespective of whether pursuit of the recovery action, claim or remedy is successful.
36. The Applicant acknowledges and agrees that payments by the Applicant will be applied by the Supplier as follows:
  - (a) Firstly, in payment of any and all collection costs and legal costs in accordance with clauses 18 and 35.
  - (b) Secondly, in payment of any interest incurred in accordance with clause 39.
  - (c) Thirdly, in payment of the outstanding invoice(s).

## Taxes and duty

37. The Applicant must pay GST on any taxable supply made by the Supplier to the Applicant under this agreement. The payment of GST is in addition to any other consideration payable by the Applicant for a taxable supply.
38. If as a result of:
  - (a) any legislation becoming applicable to the subject matter of this agreement; or

(b) any changes in legislation or its interpretation by a court of competent jurisdiction or by any authority charged with its administration; the Supplier becomes liable to pay any tax, duty, excise or levy in respect of the amounts received from the Applicant, then the Applicant must pay the Supplier these additional amounts on demand.

**Interest rates**

39. The interest rate on any outstanding debts is determined by the Commonwealth Australia Bank on overdraft facilities exceeding \$100,000. Interest will be calculated and will accrue daily.

**Set-off**

40. All payments required to be made by the Applicant under this agreement will be made free of any set-off, or counterclaim and without deduction or withholding.

41. Any amount due to the Supplier from time to time may be deducted from any monies which may be or may become payable to the Applicant by the Supplier.

**Miscellaneous**

42. The Supplier is not liable for any loss caused to the Applicant by reason of strikes, lockouts, fires, riots, war, embargoes, civil commotions, acts of God or any other activity beyond the Supplier's control.

43. In relation to the supply of goods, the Supplier's liability is limited to:

- (a) replacing the goods or supplying similar goods;
- (b) repairing the goods;
- (c) providing the cost for replacing the goods or for acquiring equivalent goods; and
- (d) providing the cost for having the goods repaired.

44. In relation to the supply of services, the Supplier's liability is limited to:

- (a) supplying the service again; or
- (b) providing for the cost of having the services supplied again.

45. The Supplier is not liable, whether claims are made or not, for loss of profit, economic or financial loss, damages, consequential loss, loss of opportunity or benefit, loss of a right or any other indirect loss suffered by the Applicant.

46. The Supplier is not liable, whether claims are made or not, for loss of profit, economic or financial loss, damages, consequential loss, loss of opportunity or benefit, loss of a right or any other indirect loss suffered by the Applicant.

47. The Applicant will, at the request of the Supplier, execute documents and do such further acts as may be required for the Supplier to register the security interest granted by the Applicant under the PPSA.

48. The Applicant agrees to accept service of any document required to be served, including any notice under this agreement or the PPSA or any originating process, by prepaid post at any address nominated in this application or any other address later notified to the Supplier by the Applicant or the Applicant's authorised representative.

49. The Applicant further agrees that where we have rights in addition to those under part 4 of the PPSA, those rights will continue to apply.

50. The Applicant irrevocably grants to the Supplier the right to enter upon the Applicant's property or premises, without notice, and without being in any way liable to the Applicant or to any third party, of the Supplier has cause to exercise any of their rights under sections 123 and/or 128 of the PPSA, and the Applicant shall

indemnify the Supplier from any claims made by any third party as a result of such exercise.

51. Nothing in this agreement shall be read or applied so as to purport to exclude, restrict or modify or have the effect of excluding, restricting or modifying the application in relation to the supply of any goods and/or services pursuant to this agreement of all or any of the provisions the Competition and Consumer Act 2010 or any relevant State or Federal Legislation which by law cannot be excluded, restricted or modified.

**Severance**

52. If any provision of this agreement is not enforceable in accordance with its terms, other provisions which are self-sustaining are, and continue to be, enforceable in accordance with their terms.

53. If any part of this agreement is invalid or unenforceable, that part is deleted and the remainder of the agreement remains effective.

**Variation**

54. The Applicant agrees that these terms and conditions may be varied, added to, or amended by an authorised officer of the Supplier at any time by written notice to the Applicant.

55. Any proposed variation to these terms and conditions by the Applicant must be requested in writing. The Supplier may refuse any such request without providing reasons either orally or in writing.

**Consent to register**

56. The Applicant hereby consents to the Supplier recording the details of this Agreement on the Personal Property Securities Register and agrees to do all things necessary and reasonably required by the Supplier to effect such registration.

57. The Applicant waives any right or entitlement to receive notice of the registration of any security interest(s) created by this instrument on the Personal Property Securities Register.

**Entire agreement**

58. This agreement constitutes the entire agreement between the parties relating in any way to its subject matter. All previous negotiations, understandings, representations, warranties, memoranda or commitments about the subject matter of this agreement are merged in this agreement and are of no further effect. No oral explanation or information provided by a party to another affects the meaning or interpretation of this agreement or constitutes any collateral agreement, warranty or understanding.

**Privacy Act**

59. The Applicant agrees to the terms of the *Privacy Act 1988* authorisation contained in this document.

**Continuing agreement**

60. For the avoidance of all doubt, the sale or disposal of the Applicant's business does not terminate this Agreement or any associated Guarantee. This Agreement and any associated Guarantee will remain in full force in relation to any goods supplied to the business prior to the date that the Applicant notifies the Supplier in writing of the sale of the Applicant's business. The Applicant shall remain liable for all orders delivered to the business (even if the sale of the business has been completed) up until the business day after the Supplier receives written notice of the sale of the business from the Applicant or from the Applicant's duly authorised representative.

The Applicant hereby applies for the opening of an account and provides the above information in support thereof.

<b>Name (print)</b>		<b>Witness name (print)</b>	
<b>Signature</b>		<b>Signature</b>	
<b>Date</b>		<b>Date</b>	
<b>Name (print)</b>		<b>Witness name (print)</b>	
<b>Signature</b>		<b>Signature</b>	
<b>Date</b>		<b>Date</b>	
<b>Name (print)</b>		<b>Witness name (print)</b>	
<b>Signature</b>		<b>Signature</b>	
<b>Date</b>		<b>Date</b>	

**FOR COMPLETION BY MIDWEST FOODS**

The Applicant's credit application is accepted.

**ACCOUNT APPROVED FOR TERMS OF** \_\_\_\_\_ / \_\_\_\_\_ / \_\_\_\_\_  
 (supplier to nominate) (duly authorised officer) Date: / /

**PRIVACY ACT 1988 AUTHORISATION**

To enable the Supplier to assess the credit application or to review any existing credit, the Applicant and Guarantors authorise the Supplier to obtain:

1. from a credit reporting agency a credit report containing personal information about the Applicant and Guarantors in relation to credit provided by the Supplier (section 18K(1)(a) of the *Privacy Act 1988*);
2. a report from a credit reporting agency containing personal information about the Applicant and the Guarantors (section 18K(1)(b) of the *Privacy Act 1988*); and
3. a report containing information about the Applicant's and the Guarantors' commercial activities or commercial credit worthiness from a business which provides information about the commercial credit worthiness of a person or an entity in relation to credit provided by the Supplier (section 18L (4) of the *Privacy Act 1988*).

The Applicant and the Guarantor authorises the Supplier to provide certain personal information about the Applicant and the Guarantor under section 18E(8)(c) of the *Privacy Act 1988*. The information which may be given to an agency is covered by section 18E(1) of the *Privacy Act 1988* and includes

1. the fact that application for credit has been made;
2. the fact that the Supplier is a credit provider to the Applicant;

3. payments which become overdue more than 60 days;
4. advice that payments are no longer overdue;
5. cheques drawn by the Applicant in excess of \$100 that have been dishonoured more than once;
6. in specified circumstances, that in the opinion of the Supplier the Applicant has committed a serious credit infringement;
7. that the credit provided to the Applicant by the Supplier has been discharged.

In accordance with section 18N(1)(b) of the *Privacy Act 1988*, the Applicant authorises the Supplier to give and obtain from credit providers named in this credit application and credit providers that may be named in a credit report issued by a credit reporting agency information about the Applicant's credit arrangement. The Applicant acknowledges that the information can include any information about the Applicant's credit worthiness, credit standing, credit history or credit capacity that credit providers are allowed to give or receive from each other under the *Privacy Act 1988*.