

# KAPITI CHOCOLATE FACTORY LIMITED TERMS AND CONDITIONS OF SALE – JUNE 2019

1. **GENERAL**
  - 1.1 In these Terms:
    - (a) **Agreement** means the Application for Credit and Terms of Sale Agreement signed by the Customer together with these Terms.
    - (b) **Customer** means the person, firm, company or entity buying Goods from the Seller.
    - (c) **Goods** means the Goods specified in the Customer's order.
    - (d) **Seller** means Kapiti Chocolate Factory Limited and its successors and assigns.
    - (e) **Terms** means these Terms and Conditions of Sale.
2. **ORDERS AND PRICE**
  - 2.1 The Customer agrees to place orders in accordance with the Seller's ordering procedures as advised by the Seller from time to time. Customers are strongly encouraged to place orders in writing. Orders should clearly state the Customer's particular requirements and be ideally completed on the Seller's Order Form. The Seller will not be responsible for errors or omissions arising from misinterpretation of the Customer's verbal instructions.
  - 2.2 The Customer agrees that each order accepted by the Seller will constitute a separate contract on the terms of this Agreement.
  - 2.3 The Customer will pay the price indicated on the invoice, order form, or other similar document issued by the Seller, together with the amount of any Goods and Services Tax or any other tax which may be payable in respect of the supply of Goods or otherwise under these Terms.
  - 2.4 Where urgent delivery is requested the Seller may add an extra charge to the price.
3. **PAYMENT**
  - 3.1 The Customer will pay all amounts due on or before the due date stated on the invoice. Notwithstanding this credit period, full payment for all unpaid Goods becomes due immediately upon:
    - (a) the Customer or any guarantor becoming insolvent or bankrupt;
    - (b) the commencement of any act or proceeding in which the Customer's or any guarantor's insolvency is involved;
    - (c) the Customer or any guarantor resolving to wind up or being ordered to be wound up or having a receiver, liquidator or official manager appointed in respect of all or any of its assets; or
    - (d) the Customer or any guarantor ceasing to trade.
  - 3.2 All payments by the Customer will be full, free and clear of any deduction, withholding, set-off, counterclaim or other claim.
  - 3.3 Without prejudice to any other remedies the Seller may have, if at any time the Customer is in breach of any obligation (including those relating to payment) the Seller may suspend or terminate the supply of Goods to the Buyer and any of its other obligations under the Agreement. The Seller will not be liable to the Buyer for any loss or damage the Buyer suffers because the Seller has exercised its rights under this clause.
  - 3.4 Failure by the Customer to make payment in full of any amount payable pursuant to this Agreement on the due date constitutes a default and, without prejudice to any other rights or remedies of the Seller, simple interest at 2.5% per month will be payable on demand from the due date until payment.
  - 3.5 If any account remains overdue after thirty (30) days then an amount being the greater of twenty dollars (\$20.00) or ten percent (10%) of the amount overdue (up to a maximum of two hundred dollars (\$200.00)) will be levied for administration fees. This levy will accrue each month that the Customer's account remains overdue.
  - 3.6 The Customer will indemnify the Seller against all loss, costs and expenses, including legal costs on a solicitor/client basis, which the Seller may suffer or incur as a result of any failure by the Customer to make due and punctual payment.
4. **DELIVERY AND DEFECTS**
  - 4.1 The Seller undertakes to use reasonable endeavours to deliver the Goods within the time specified by the Seller but dates it gives for delivery are indicative only. No date specified by the Customer is binding on the Seller without the written agreement of the Seller.
  - 4.2 On the delivery of the Goods to the Customer, the Customer must immediately inspect the Goods to satisfy itself that the Goods are in accordance with the order, and do not contain any material defects.
  - 4.3 If the Goods are not in accordance with the order, or contain a material defect the Customer must, within 7 days of the delivery, advise the Seller in writing. The Customer will give the Seller the opportunity to inspect the Goods and must (at the Customer's cost) store the Goods separately and in the state and condition in which they were supplied until the Seller's inspection.
  - 4.4 If the Seller does not receive forwarding instructions adequate to enable delivery within 14 days after notification that the Goods are ready for despatch, the Customer will as from the 15th day be deemed to have taken delivery of the Goods, and payment will become due as if delivery had then occurred. In such circumstances the Seller will only be obliged to store the Goods for so long as it is considered reasonably practicable, having regard to available storage space. During such time the Goods will be stored solely at the Customer's risk, and any costs of storage will be chargeable to the Customer, in addition to the quoted price.
5. **OWNERSHIP AND RISK**
  - 5.1 The Seller retains ownership (both legal and equitable) of any Goods delivered by the Seller to the Customer (and the Customer is a bailee only in respect of those Goods) until payment in full is made for those Goods. Until such time, the Customer retains possession of the Goods in its premises as bailee in a manner such that they are readily identifiable as the Seller's property.
  - 5.2 Unless the Seller directs otherwise, the Customer may sell any Goods to third parties in its normal course of trading.
  - 5.3 Risk in Goods supplied by the Seller to the Customer passes to the Customer when such Goods are delivered to the Customer or into custody on the Customer's behalf **provided that** if the Customer fails to accept the Goods or requests that delivery of the Goods be delayed, risk in the Goods will be borne by the Customer from the time of such failure or request.
  - 5.4 The Customer must insure and keep insured delivered Goods to the full sale price against all risk until the Seller has received payment for the Goods in full. The Customer will, upon request, provide evidence of insurance cover.
6. **PERSONAL PROPERTY SECURITIES ACT 1999 ("PPSA") AND PROTECTION OF THE SELLER'S RIGHTS**
  - 6.1 The Customer acknowledges that on signing the Agreement the Customer grants the Seller a security interest in favour of the Seller in respect of the Goods and their proceeds and secures payment by the Customer to the Seller of all amounts from time to time owing by the Customer to the Seller under this Agreement or any other agreement between them. When Goods supplied by the Seller have become an accession or have been manufactured, processed, co-mingled or affixed with other property, the Customer will ensure that Goods supplied by the Seller and their proceeds will remain identifiable. The Customer acknowledges that the Customer's security interest continues in the accession or the processed or co-mingled goods and their proceeds.
  - 6.2 The Customer will promptly do all things, sign any further documents and/or provide any further information which the Seller may reasonably require to enable the Seller to perfect and maintain the perfection of its security interest.
  - 6.3 The Customer will notify the Seller of any change in name and/or any other change in the Customer's details (including, but not limited to, changes in the Customer's address, email address, trading name or business practice) not less than 14 days before the change takes effect.
  - 6.4 The Seller and the Customer agree that to the fullest extent permitted by law, nothing in sections 114(1)(a) and 133 of the PPSA will apply in respect of the Customer and the Seller. The Customer waives its rights as a debtor under sections 116, 120(2), 121, 125, 126, 127, 129 and 131 of the PPSA.
  - 6.5 The Customer waives the right to receive a copy of the verification statement or a financing change statement in respect of the Customer's security interest.
  - 6.6 In the event that:
    - (a) the Customer fails to perform any obligation contained or implied in this Agreement; and/or
    - (b) it is necessary for the Seller to take any steps or incur any expense to protect its interests under this Agreement, including the registration and maintenance of the Seller's security interests or repossession of the Goods; then the Seller may perform such obligation, pay such money, or incur such expense, and the Customer will indemnify and reimburse the Seller for all monies paid or expenses incurred (including all legal and associated costs) by the Seller (inclusive of any tax).
  - 6.7 The Customer must not create, or allow or permit the creation of, a security interest (as defined in the PPSA) or lien in any Goods.
  - 6.8 If the Customer has not paid an account in full by the due date for payment, the Seller or its agent(s) may (in addition to its other rights), and is authorised to, enter the Customer's premises without giving prior notice and recover its Goods, and may resell any of them, without incurring any liability to the Customer or any person claiming through the Customer. The Customer may not revoke the permission granted in this clause.
7. **WARRANTIES AND LIABILITY**
  - 7.1 Provided that the Customer complies with clause 4.3, the Seller warrants that, for a period of 3 months after delivery, the Goods will be free of material defects and materially conform to the specification provided by the Seller (if any).
  - 7.2 All warranty claims pursuant to clause 7.1 will be subject to assessment by the Seller as to whether the warranty claim is valid. Where the Seller (acting reasonably) determines that the warranty claim is not valid, then the Customer will pay to the Seller the reasonable costs or expenses incurred by the Seller in rectifying the claim.
  - 7.3 The Seller will have the option, exercisable at its discretion, to replace or give credit for any Goods in respect of which a breach of warranty claim is made and proven, or to refund the price paid by the Customer, thereby fully discharging all legal liability of the Seller.
  - 7.4 If the Customer is a consumer under the Consumer Guarantees Act 1993 (CGA), nothing in this Agreement limits the Customer's rights under the CGA. If the Customer acquires the Goods for business purposes, the provisions of the CGA will not apply and are expressly excluded.
  - 7.5 Subject to clause 7.4:
    - (a) All warranties of merchantability or fitness for a particular purpose and all other representations, statements, warranties or conditions whether statutory or made by any representative or agent of the Seller or otherwise, whether express or implied, are excluded to the extent permitted by law.
    - (b) The Seller's liability under or arising from this Agreement, whether in contract, tort, equity or otherwise, is limited to the lower of: (i) the price actually paid by the Customer for the Goods complained of; (ii) the cost of repairing the Goods; and (iii) the actual loss or damage suffered by the Customer.
    - (c) The Seller accepts no liability for any damages or losses arising from any act, default or negligence on the part of the Customer or its employees, subcontractors or agents.
    - (d) Neither party will be liable for indirect, special, consequential or similar losses or damages, including but not limited to loss of profit or revenues, or other financial or economic losses of any kind, and whether or not the other party has been advised of the potential for such damages.
  - 7.6 The Customer will indemnify and hold harmless the Seller against any losses, liabilities, costs or actions suffered or incurred as a consequence of any third party claiming that work undertaken by the Seller is offensive or illegal, in breach of any intellectual property right, or other right which the third party may have.
8. **INFORMATION ABOUT CUSTOMER**
  - 8.1 The Customer must notify the Seller of any change in circumstances that may affect the accuracy of the information provided by the Customer to the Seller.
  - 8.2 Any personal or credit information provided by the Customer or obtained by the Seller will be held by the Seller and may be used by it for any of the following purposes: determining eligibility and terms for the provision of credit to the Customer, supplying the Customer with the Goods, enforcing debts and other legal obligations owing to the Seller and disclosure to third parties associated with any of those purposes (including a credit reporting agency).
  - 8.3 The Customer authorises all persons, companies, credit reporting agencies and other entities to provide the Seller with such information as it may at any time request about the Customer (including where applicable, its principals and directors) in relation to any of the purposes listed in clause 8.2 of these Terms.
9. **GENERAL**

- 9.1 **Force majeure:** If any cause beyond the reasonable control of the Seller including but not limited to order of a government or other authority, strike, lockout, labour dispute, delays in transit, difficulty in procuring components or ingredients, embargo, accident, emergency, inclement weather, act of God or other contingency interferes with delivery by the Seller or with the performance by the Seller or any of its obligations under this Agreement then the Seller may at its sole discretion suspend its performance of any such obligation or cancel this Agreement and will not be liable to the Customer in any respect.
- 9.2 **Severability:** If any clause or provision of this Agreement is held illegal or unenforceable by any judgment of any Court or Tribunal having competent jurisdiction, such judgment will not affect the remaining provisions of this Agreement which will remain in full force and effect as if such clause or provision held to be illegal or unenforceable had not been included.
- 9.3 **Variation to Terms:** The Seller may vary or replace these Terms from time to time by notice in writing to the Customer, which may be by email or by publication on the Seller's website. Any such variation / replacement will only apply to future orders placed by the Customer.
- 9.4 **Waiver:** This Agreement remains in force notwithstanding any neglect, forbearance or delay in enforcement. The Seller may only waive a term or condition in writing, and such waiver will only apply to the particular transaction to which it refers.
- 9.5 **Assignment:** The Customer may not transfer its rights in respect of the purchase of Goods under this Agreement to any other party without the Seller's prior written consent.
- 9.6 **Governing law and jurisdiction:** This Agreement is governed by and construed in accordance with the laws of New Zealand in English, and each of the parties submits to the non-exclusive jurisdiction of the courts of New Zealand.