

# TERMS AND CONDITIONS OF SALE - KIRSCH PHARMA AUSTRALIA PTY LTD

## 1. DEFINITIONS

The following meanings apply when used in these Terms:

- "Buyer"** means any purchaser of the Products pursuant to an Order;
- "Costs"** means and includes costs, charges, expenses, disbursements, fees, commissions, insurance premiums, levies, Taxes and Duties;
- "Duties"** includes stamp, transaction or registration duties or similar charges levied or imposed by any governmental agency;
- "GST"** has the meaning given to that term in the *A New Tax System (Goods and Services Tax) Act 1999*;
- "Incoterms"** means the Incoterms 2000 as published by the International Chamber of Commerce;
- "Order"** means any request for the supply of Products received by the Seller;
- "Products"** means the range of the Seller and any Related Company products and services relating to [raw materials for pharmaceuticals and food, fine chemicals, active substances and drugs];
- "Seller"** means Kirsch Pharma Australia Pty Limited (ACN 112 144 939);
- "Related Company"** means a related body corporate within the meaning of the *Corporations Act 2001* (Cth);
- "Specified Rate"** means interest at the rate of 2% above the then published Westpac Banking Corporation 90 day Bank Bill Rate for amounts over \$100,000;
- "Taxes"** means and includes taxes, levies, imposts, deductions, charges, rates or duties levied or imposed by any governmental agency, including without limitation sales, GST or any other tax on goods and services, consumption tax or value added tax, together with associated interest, penalties, charges, fees or other amounts which may become payable for any reason in connection with the supply of any Products;
- "Terms"** means the terms and conditions set out herein; and
- "TPA"** means the Trade Practices Act 1974 (Cth).

## 2. FORMATION AND SCOPE OF CONTRACT

A contract for sale of Products by the Seller to the Buyer is formed upon the loading of the Products for delivery to the Buyer. The only contractual terms which are binding upon the Seller are these Terms those otherwise expressly, agreed to in writing by the Seller and those, if any, which are imposed and which cannot be excluded by law. These Terms will prevail in the event of any inconsistency between these Terms and any term or condition sought by the Buyer either before or after these Terms are made available to the Buyer.

## 3. PRICES

The prices charged and payable shall be the Seller's prices on the date the Buyer's order, has been confirmed by the Seller, unless otherwise advised in our order confirmation and will be subject to our validity dates as stipulated on any given quotation.

As a definition of our terms of delivery our sales prices are calculated, including packaging and supplied according to the Incoterms as agreed in writing by the Seller.

Before any order confirmation is made, the Seller shall be entitled, with notice to the Buyer, to adjust the selling price of the Products, in the event of and to take into account of any increase in the costs incurred by the Seller, including but not limited to the supply and manufacturing costs of the Sellers, insurance, exchange rates, quarantine, customs or port charges and import duties charges or levies.

The price of the Products does not include:

- (a) handling, storage, insurance and similar costs incurred in the course of transit of the Products to or from the Buyer or while in the custody or control of the Buyer; and
- (b) expenses incurred by the Seller for storage of Products if the Buyer does not provide delivery instructions to the Seller; all of which are payable in full by the Buyer.

## 4. TERMS

Unless otherwise agreed to in writing by the Seller, payment for the Products and all other costs and expenses shall be made to the Seller strictly net cash within thirty (30) days from invoice date. If payment is to be made in a currency other than Australian Dollars ("foreign currency"), the Seller reserves the right to adjust its prices at the time of invoicing so that the foreign currency amount started in the invoice equals the Australian Dollar value applicable at the date of delivery. Any offer of credit terms will be solely at the discretion of the Seller and will be subject to approval of a credit account application.

Should the Buyer delay or default in any payment due to the Seller, the Seller shall have the right, in addition to all other rights herein given or which are conferred by law, to charge interest at the Specified Rate. Such interest shall be calculated from the date payment is due to the date of full and final payment.

If, in the Seller's opinion, the Buyer's financial status is or becomes unsatisfactory to the Seller, the Seller reserves the right to require payment of the price in cash in advance, or security for the price in respect of all future deliveries and for Products previously delivered for which payment has not been received or may, without prejudice to its other rights, either suspend further deliveries or terminate any Order by written notice to the Buyer.

## 5. DELIVERY

The Products shall be delivered to the Buyer's warehouse or other location nominated by the Buyer unless otherwise stipulated by the Buyer at the time of the purchase order.

It is agreed that the Seller is not a common carrier and that in the event of loss or damage to Products in transit caused by or resulting from any act, neglect or default attributable to the Seller, the Seller's liability to the Buyer shall be limited to and completely discharged by either the replacement or the repair of any of the Products so lost or damaged. Except as otherwise expressly agreed in writing, the Seller is not responsible for off-loading of the Products or their safe storage at the point of delivery.

The Seller will make reasonable efforts to have the Products delivered to the Buyer on the agreed delivery date but any date named or accepted by the Seller is an estimate only and the Seller shall be under no liability whatsoever should delivery not be made on the date agreed.

## 6. TITLE AND RISK

Unless otherwise agreed in writing, risk in the Products shall pass to the Buyer upon the sooner of the happening of:

- (a) the loading of the Products on an outside carrier vehicle or the Buyer's carrier; or
- (b) delivery to the Buyer, his carrier or agent.

Title in the Products supplied, sold or delivered by the Seller to the Buyer will not pass to the Buyer until all Products the subject of this contract and all Products supplied on similar terms (the "Current Account Products") have been paid for in full. Until property and ownership in the Current Account Products pass from the Seller to the Buyer, the Buyer:

- (a) shall keep them separately identified and stored in such manner as to show clearly that they are the property of the Seller;
- (b) shall, at its expense, insure the Products for their full value;
- (c) as a fiduciary and trustee for the Seller, may sell them in the ordinary course of its business.

The Buyer acknowledges and agrees that until the Products are paid for or if the Buyer defaults in payment of the purchase price or if the contract terminates in accordance with these Terms for any reason, the Seller and its employees or agents shall have the right to enter upon the Buyer's premises to repossess the Products and for this purpose the Buyer shall grant all reasonable access rights to the Seller. Upon repossession of the Products by the Seller the risk in the Products shall revert to the Seller. The Buyer will, until a re-sale of the Products by the Buyer, continue to hold the Products as bailor and trustee in accordance with this clause 6.

## 7. BUYER'S LIABILITY AND DEFAULT

If the Buyer:

- (a) fails to make a payment due under this contract or commits a breach of any of the Buyer's obligations under this contract;
- (b) is unable or deemed to be unable to pay its debts as and when they fall due;
- (c) suffers execution against it, or a mortgagee or other security holder enters into possession of all or any part of the property of the Buyer;
- (d) commits an act of bankruptcy;
- (e) makes any composition or arrangements with creditors; or
- (f) being a company, passes a resolution for winding up or has an administrator, controller, receiver or manager appointed over any of its property or has a winding up petition presented against it,

the Seller (in addition to any other remedies hereby or by any statute conferred) may, at its option, withhold further deliveries and treat the contract as terminated. Any part of the purchase price then unpaid shall immediately become due and payable and such termination shall be without prejudice to any claim or rights the Seller may possess.

In the event that the Buyer, being a company, passes any resolution or takes any step, or any step is taken by a third party in connection with the appointment of an administrator or liquidator, this contract shall automatically terminate and any part of the purchase price then unpaid shall immediately become due and payable and such termination shall be without prejudice to any claim or rights the Seller may possess.

The Buyer's rights, in the ordinary course of its business acting in a fiduciary capacity for the Seller, to sell the Products, ceases automatically upon termination of this contract.

Subject to any restriction imposed by law, if any event described above occurs, the Seller shall be deemed for the purposes of the *Corporations Act 2001* (Cth) to have entered possession, assumed control or exercised a power in relation to Products supplied under this contract.

In the event that the Seller repossesses the Products, the Buyer's liability to the Seller shall be reduced according to the value of the Products which are repossessed. Such reduction cannot be utilised by the Buyer until the value of the repossessed Products is established and until then, the Buyer shall be liable to the Seller without reduction in respect of the repossessed Products.

In the three month period following repossession of the Products, the Seller shall exercise reasonable endeavours to sell all or part of the Products for a reasonable price in all of the circumstances.

The value of the repossessed Products shall be calculated by reference to the price paid for all or part of the Products sold at any sale achieved within three months of the date of repossession of those Products by the Seller, but if any of the Products repossessed remain unsold after that three month period then there shall be no reduction in the Buyer's liability as a consequence of the repossession of those Products.

## 8. CONSIGNMENT STOCK

Title to and risk in consignment stock at the Buyer's premises shall pass in the same manner as title to and risk in the Products. Payment for consignment stock is due thirty (30) days after the end of the month in which the consignment stock is used by the Buyer. The Buyer shall take all possible precautions to ensure that no deterioration occurs in consignment stock and shall inform the Seller in writing immediately should it so occur.

## 9. WARRANTIES

The only conditions and warranties which are binding on the Seller in respect of the state, quality or condition of any Products are those imposed and required to be binding by statute and only to the extent imposed or required. The liability, if any, of the Seller arising from the breach of such conditions or warranties shall, at the Seller's option, be limited to and completely discharged by either the replacement or the repair of the Products and otherwise all other conditions and warranties whether express or implied by law may, apart from this clause, be binding on the Seller, are hereby expressly excluded and negated.

Except to the extent provided above, the Seller shall have no liability to the Buyer or any third party for any loss or damage consequential or otherwise howsoever suffered or incurred in relation to any Products and in particular, any loss or damage consequential or otherwise howsoever suffered, incurred, caused by or resulting directly or indirectly from any failure, breakdown defect or deficiency of whatsoever nature or kind or in the Products.

## 10. PATENTS AND TRADEMARKS

The Seller makes no representation or warranty of any kind, express or implied, that the Products or the use of such Products or articles made there from, either alone or in conjunction with other substances, will not infringe any patent or trademark right. The Buyer will immediately notify the Seller of any claim or suit involving the Buyer in which such infringement is alleged and if the Buyer considers itself to be affected it shall be entitled completely to control the defence or compromise of any such allegation of infringement.

## 11. OBLIGATIONS OF THE BUYER

The Buyer agrees and warrants that all of the Products supplied will be inspected and tested by the Buyer in accordance with any applicable regulatory or industry guidelines, policies or relevant best practice including ensuring that the Products are free of defects and conform with any applicable specifications before being used, sold or used in the production of other goods and in any event within seven (7) days of taking delivery of the Products. This requirement applies to all separate packages in the same batch. In the event that the Buyer fails to test the Products as required in these Terms or if the Buyer tests the Products but fails to notify the Seller of any defect in the Products supplied or uses the Products that it knows or suspects are defective, the Buyer acknowledges and agrees that:

- (a) it will have waived any rights to claim for any loss or damage arising from any fault or defect in any or all of the Products;
- (b) the Seller is not liable for any loss, damage or cost suffered or incurred by the Buyer or any third party as a result of any alleged or actual defect in the Products; and
- (c) that the Buyer will indemnify and hold harmless the Seller for any liability in law or equity and any associated cost on an indemnity basis that the Seller may suffer or incur in relation to the supply of the Products to the Buyer, including without limitation the costs of any product recall.

The Buyer must have appropriate facilities for the safe unloading and storage of the Products when delivered. The Buyer agrees to indemnify the Seller for any loss or damage to any or all of the Products and any loss, damage or injury to any person arising from the unloading and storage of the Products by the Buyer.

## 12. HEALTH AND SAFETY

It is the Buyer's responsibility to ensure that all applicable health and safety regulations are observed and other appropriate steps taken in relation to the storage, handling and use of the Products and where information is supplied to the Buyer on potential hazards relating to the Products, to bring such information to the attention of its employees, agents, sub-contractors, visitors and customers. Without prejudice to the foregoing it is also the Buyer's responsibility to provide safe facilities for the reception of the Products into storage including the unloading of Products from carriers. The Buyer hereby indemnifies and shall keep indemnified the Seller against all actions claims demands summon suits proceedings judgements, orders or decrees arising out of or in connection with any act or omission of the Buyer in respect of its obligations pursuant to this clause.

## 13. FORCE MAJEURE

The Seller is not liable for any breach of its obligations to the Buyer if that breach arises from circumstances including lockouts, strikes or other labour disturbances, acts of God, war, riot, civil commotion, acts of government, explosion, accident, flood, sabotage, inability to obtain fuel, power, raw materials, labour, containers or transportation facilities, breakage or failure of machinery or apparatus, or any other event beyond the reasonable control of the Seller or a Related Company which prevents the manufacture, delivery or acceptance of the Products or of a material upon which the manufacture of the Products is dependent. If, because of any such event, the Seller is unable to supply any or all of the Products ordered, the Seller may totally or partially suspend delivery of the Products and allocate its available supply of Products without obligation to purchase similar Products from other sources among itself and all of its customers on such basis as it determines to be equitable. During the period of total or partial suspension of delivery, the Buyer shall be free to purchase elsewhere at its sole risk and cost such quantities of alternative products necessary to cover the shortfall of Products not delivered by the Seller. Notwithstanding anything else contained in these Terms, the Seller shall incur no liability whatever as a result of such suspension and the Seller shall be under no obligation to subsequently deliver Products not delivered during the period of suspension, but this contract shall otherwise remain unaffected.

## 14. LIABILITY FOR STATEMENTS OR INFORMATION

Any statement made by the Seller or a Related Company with regard to the Products in relation to their performance, efficiency or suitability for any particular purpose is made only as a bona fide estimate without any warranty as to its correctness. The descriptions, specifications, illustrations and performances contained in any brochures, catalogues, price lists and other advertising material prepared or produced by or on behalf of the Seller do not form part of these Terms.

## 15. WAIVER

No waiver by the Seller with respect to any breach or default or any right or remedy shall be effective unless it is in writing, signed by the Seller and no such waiver shall be deemed to constitute a continuing waiver of any other breach or default or any other right or remedy unless expressed in writing and signed on behalf of the Seller.

## 16. SEVERABILITY

Any provision of these Terms which is or becomes prohibited, unenforceable or void in any jurisdiction shall, as to such jurisdiction, be deemed to be deleted and ineffective to the extent of such prohibition or unenforceability without in any way affecting the validity or enforceability of the remaining provisions or affecting the validity or enforceability of such provision in any other jurisdiction.

## 17. LEGAL CONSTRUCTION

These Terms are governed by the law of New South Wales, Australia, and the parties consent and submit to the non-exclusive jurisdiction of the courts of New South Wales and courts that hear appeals from those courts.