



FRUITMARK

Fruitmark Pty Ltd ABN 25 003 815 334

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TERMS OF TRADE

The following terms of trade ("**these Conditions**") apply to and form part of any sale between Fruitmark Pty Ltd trading as Fruitmark ("**Fruitmark**") ACN 003 815 334 ABN 25 003 815 334 and the Customer for the sale of the Goods or Services by Fruitmark to the Customer.

These Conditions replace any previous terms and conditions.

1. Definitions and Interpretation

1.1 Where the context permits, the following expressions will have the meanings given to them:

- "Business Day" means any day other than a Saturday, Sunday or a designated Public Holiday in Victoria;
- "Customer" means a party acquiring Goods or Services or Services from **Fruitmark**;
- "Goods" means products supplied or to be supplied by **Fruitmark** to the Customer from time to time.
- "Intellectual Property Rights" means all intellectual property rights, including all copyright, patents, trade marks, design rights, trade secrets, domain names, know how and other rights of a similar nature, whether registrable or not and whether registered or not, and any applications for registration or rights to make such an application;
- "Order" is a written order to purchase clearly identified Goods or Services (including quantity, specifications and other relevant matters) at a price specified in a Quotation signed by or on behalf of the Customer;
- "PPSA" means the *Personal Property Securities Act 2009* (Cth);
- "Quotation" is a quotation as to the price of specified Goods or Services given by **Fruitmark** to the Customer; and
- "Services" means services performed or to be performed by **Fruitmark** for the Customer from time to time.

1.2 In the interpretation of these Conditions, unless specified to the contrary:

- (a) time is of the essence;
- (b) words importing the singular include the plural and vice versa;
- (c) words importing any gender include all other genders;
- (d) a reference to a natural person includes a company or other corporate body and vice versa;
- (e) a reference to any legislation, regulation, code or local law includes any modification, re-enactment or substitution of it;
- (f) the obligations on the part of a Customer who is a natural person includes his heirs, executors, administrators and assigns; and
- (g) the obligations on the part of a Customer which is a company or other corporate body includes its successors and assigns.

1.3 Any obligation imposed by these Conditions on a Customer comprised of two or more persons (whether natural, corporate or a combination of the two) binds them jointly and each of them severally.

1.4 Clause headings are for ease of reference only and are not intended to affect the construction or interpretation of these Conditions.

1.5 If the time for performing any obligation under these Conditions expires on a non-Business Day, then time is extended until the next Business Day.

1.6 A waiver by **Fruitmark** of a default by the Customer under these Conditions will not constitute a waiver of another or continued default of the same nature or any other provision of these Conditions.

1.7 In the event that any or part of these Conditions is held to be unenforceable, the unenforceable part shall be severed and the remainder of these Conditions shall remain in full force and effect.

1.8 These Conditions embody the entire agreement and understanding between the parties concerning its subject matter, and succeeds and cancels all other agreements, understandings and representations concerning the subject matter of these Conditions.

1.9 These Conditions can be varied by **Fruitmark** at any time, provided written notice of the variation is given to the Customer, with such variation to apply to all Orders and Quotations after the date of notification.

1.10 These Conditions are to be governed by and construed in accordance with the laws of the State of Victoria and the parties submit to the exclusive jurisdiction of the state and federal courts located in Victoria.

2. Formation of Contract

2.1 Quotations issued by Fruitmark will not constitute an offer to sell specified Goods or Services at specified price, but rather will constitute an invitation to the Customer to make an offer to purchase the specified Goods or Services at the quoted price by placing an Order. A contract for the supply of Goods or Services by Fruitmark to the Customer is formed when Fruitmark accepts an Order.

- 2.2** These Conditions apply to and form part of every contract for the supply of Goods or Services by Fruitmark to the Customer. Orders are only accepted upon and subject to these Conditions.
- 2.3** Any qualification, addition, variation or provision which conflicts with these Conditions which appears on the Customer's Order shall not form part of the contract between Fruitmark and the Customer unless such change appears on the face of the order duly accepted by an authorised person of Fruitmark or is otherwise confirmed by Fruitmark in writing.

3. Pricing

- 3.1** Goods or Services are invoiced at the prices current on the date of delivery.
- 3.2** All prices quoted are in Australian dollars unless otherwise stated.
- 3.3** All Goods or Services must be paid for by the Customer within 30 days after the End of the Month (EOM) from the date of the invoice for the Goods or Services except where Fruitmark specifies otherwise.
- 3.4** Any tax (including GST) or other duty on the production, sale, shipment or supply of any Goods or Services sold by Fruitmark now imposed or hereafter becoming effective shall be added to the price quoted and shall be paid by the Customer to Fruitmark.
- 3.5** Delivery charges will be charged to the Customer by Fruitmark unless otherwise agreed by Fruitmark in writing.
- 3.6** If after acceptance of an Order and up until and including the date of delivery there are increases in the costs incurred by Fruitmark due to fluctuations in the cost of raw materials, the Goods themselves, currency exchange rates, duty rates, freight rates or any other factors beyond the control of Fruitmark, Fruitmark reserves the right to increase the prices to include allowance for such increased costs by notice in writing to the Customer.

4. Delivery

- 4.1** Fruitmark shall arrange delivery of the Goods or Services to the location agreed by Fruitmark and the Customer unless the Customer has arranged to collect the Goods or Services from Fruitmark.
- 4.2** Fruitmark will not be liable for any loss or damage which may be suffered by the Customer (including consequential loss or damage) arising out of a delay in the delivery of Goods or Services, a failure to deliver any Goods or Services or from delivery of damaged or defective Goods or Services.
- 4.3** Without limiting the operation of the previous subclause, the Customer must accept and pay the full invoiced costs for the Goods or Services ordered notwithstanding a delay in the delivery of the Goods or Services, a failure to deliver any Goods or Services or delivery of damaged or defective Goods or Services.
- 4.4** Fruitmark reserves the right to deliver any one or more consignments as part delivery with each consignment to be paid for in accordance with these Conditions.
- 4.5** The Customer must notify Fruitmark of any damage to Goods, defective Goods or Services or short delivery within 24 hours of delivery failing which the Customer will cease to have a claim for the damage, defects or short delivery.
- 4.6** If Fruitmark determines (at its sole discretion) that the delivery contained a shortfall or damaged or defective Goods then Fruitmark will arrange for replacement of such missing, damaged or defective items to be dispatched to the Customer or issue a credit note.
- 4.7** Risk for any loss or damage to the Goods from whatever cause shall be borne by the Customer from the time the Goods are dispatched or collected by the Customer from Fruitmark's premises.
- 4.8** The Customer will be responsible for and indemnifies Fruitmark for loss or damage to the Goods from the time of delivery.

5. Default

- 5.1** The Customer is in default if:
- (a) it breaches any of these conditions and either the breach cannot be remedied or, if it can be remedied, fails to remedy it within 7 days after receiving written notice of the breach;
 - (b) it fails to make a payment to Fruitmark by its due date;
 - (c) being a natural person it commits an act of bankruptcy;
 - (d) being a corporation it has an administrator, receiver, receiver and manager, provisional liquidator, liquidator or controller appointed over its assets; or
 - (e) it has any execution levied against its property.
- 5.2** In the event of a default, Fruitmark will be entitled, without the obligation to give any notice to the Customer and in addition to any other rights, to:
- (a) payment of interest on all overdue accounts at the rate of 2% per calendar month, calculated daily and capitalized monthly, for each day that the amount is overdue ;
 - (b) the commission it may have to pay to any recovery agent arising from such default or in recovering overdue amounts;
 - (c) its actual legal costs on an indemnity basis incurred in relation to such default or in recovering overdue amounts or in otherwise seeking compliance with these Conditions;
 - (d) immediate payment for Goods or Services, the payment which would otherwise not have been then due and payable;
 - (e) disallow any discounts otherwise claimable by the Customer;
 - (f) terminate or suspend delivery of any order which is the subject of any other sale between Fruitmark and the Customer; and
 - (g) treat the Customer's default as repudiation or any existing contract for the purchase of Goods or Services and recover any unpaid sum plus the interest, recovery agent's, and legal costs referred to in (a), (b) and (c) above from the Customer by way of liquidated damages.
- 5.3** If this Agreement is terminated or expires for any reason, then, in addition and without prejudice to any other rights or remedies available:

- (a) the parties are immediately released from their obligations under the Agreement except those obligations listed in clauses 5 (Termination), 10 (Limitation of Liability and Indemnity), and 13 (Intellectual Property) and any other obligations that, by their nature, survive termination; and
- (b) each party retains the claims it has against the other in respect of prior breaches of this agreement.

6. Returns

- 6.1** Goods will not be accepted for return for credit without the prior approval of **Fruitmark**, which may be granted with or without conditions or withheld at its unfettered discretion.
- 6.2** Without limiting the previous subclause, **Fruitmark** may impose an administrative charge or surcharge on any return and provide a refund in the form of a credit against future orders or may replace the Goods as it determines, solely at its discretion.
- 6.3** Non-standard or specially manufactured or labelled Goods are not returnable.
- 6.4** **Fruitmark** may in its absolute discretion require the Customer to pay any charge, levy or tax associated with the return of Goods including, but not limited to, freight costs.

7. Title and Property in Goods

- 7.1** Title to and ownership of and property in the Goods shall pass to the Customer only upon **Fruitmark** receiving payment in clear funds of the full purchase price and any freight charges, taxes and interest or other monies due and while the Goods remain the property of **Fruitmark** the Customer holds them on trust for **Fruitmark** and the Customer shall store or keep them in a manner which clearly identifies them as the property of **Fruitmark**.
- 7.2** If the Customer defaults under these Conditions, all of the Customer's rights, including the right to be paid any money, under any contract pursuant to which the Customer has hired, sold or otherwise provided the Goods or any part of them, whether separately or together with other things, to third parties are automatically assigned to **Fruitmark** with effect from the date of the default, but only to the extent necessary to enable **Fruitmark** to recover the amount owed to it by the Customer.
- 7.3** Until the Customer pays all amounts it owes to **Fruitmark**:
 - (a) the Customer must keep all Goods insured against theft, damage and destruction on behalf of **Fruitmark** (and if the Customer fails to insure the Goods **Fruitmark** may do so and invoice the Customer for the cost of insurance);
 - (b) **Fruitmark** may enter premises where the Goods are stored to inspect them on reasonable notice; and
 - (c) the Customer acknowledges that it holds the Goods as a bailee on behalf of **Fruitmark**.
- 7.4** The Customer may on-sell the Goods prior to payment in full of the purchase price as agent for **Fruitmark** provided that the proceeds received from the on-sale are held on trust for **Fruitmark** until payment in full of the purchase price and are not mixed with other funds of the Customer until the purchase price is paid to **Fruitmark**. The Customer agrees to indemnify **Fruitmark** on a full indemnity basis and hold **Fruitmark** harmless from liability for any loss damage or cost arising from any inaccurate or incomplete representations to third parties.
- 7.5** If any Goods are used in a manufacturing process or mixed with other materials, the Customer must record the value of Goods so consumed in relation to each unit of finished product and upon sale of any unit of finished product immediately hold that amount on trust for and remit that amount from the proceeds of sale to **Fruitmark**.
- 7.6** If the Customer does not pay for any Goods on the due date, **Fruitmark** is irrevocably authorised by the Customer to enter the Customer's premises (or any premises under the control of the Customer or as agent of the Customer if the Goods are stored at other premises) and use reasonable force to take possession of the Goods without liability for the tort of trespass, negligence or payment of any compensation to the Customer or anyone claiming through the Customer whatsoever.
- 7.7** If any of the Goods are not paid for in full by the due date, the Customer must not allow any person to create, have or acquire any security interest in the Goods.
- 7.8** The Customer acknowledges that **Fruitmark** holds a security interest capable of registration pursuant to the PPSA in all Goods (including all present and after-acquired Goods which have not been paid for) and in all present and after acquired personal property of the Customer to secure payment of the amount the Customer owes to **Fruitmark** from time to time. The Customer further acknowledges that the security interest will continue until **Fruitmark** gives a final release in respect of it.
- 7.9** The Customer acknowledges and agrees that **Fruitmark** may take all necessary steps to register its security interest under the PPSA, and hereby irrevocably consents to **Fruitmark** doing so. The Customer further undertakes to promptly provide any information or supply any documentation and do all such things as required by **Fruitmark** to enable it to perfect its security interest in the Goods in accordance with the PPSA.
- 7.10** The Customer acknowledges that the Goods constitute commercial property and hereby waives its right to receive notification from **Fruitmark** of the registration of the security interest pursuant to section 157(3) of the PPSA.

8. Fitness for Purpose

- 8.1** The Customer acknowledges that it has made due inquiry and relies on its own skill and judgment when deciding whether the Goods or Services are fit for purpose.
- 8.2** It is the Customer's responsibility to satisfy itself that Goods or Services are of a description, quality and character suitable for the purpose for which they are purchased and, to the extent permitted by law, **Fruitmark** shall not be liable in any way for any loss or damage (including direct, indirect or consequential) arising from the failure of the Customer to so satisfy itself.

9. Information and Warranties

- 9.1** All samples, drawings, descriptive matter and specifications issued by **Fruitmark** are issued or published for illustration only and do not form part of the Quotation or the Order unless specifically referred to therein.
- 9.2** **Fruitmark** will not be liable for any losses or damage, either directly or indirectly incurred by the use of or in reliance upon the information provided therein or for any errors, omissions or inaccuracies in the information provided.

9.3 Fruitmark, if applicable, assigns to the Customer any warranty received from the original manufacturer of the Goods so far as Fruitmark is permitted to do so.

10. Limitation of Liability and Indemnity

10.1 Subject to these Conditions, to the extent permitted by law, Fruitmark excludes all statutory or implied conditions and warranties and any other liability it may have to the Customer (including liability for indirect or consequential loss) that may arise under statute or at law including without limitation for breach of contract, in tort (including negligence) or under any other cause of action.

10.2 Subject to these Conditions, to the extent permitted by law, Fruitmark limits its liability under any condition or warranty which cannot be legally excluded in relation to the supply of Goods or Services to whichever of the following it determines at its discretion:

- (a) replacing the goods or supplying equivalent goods or services again;
- (b) paying of the cost of replacing the goods or of acquiring equivalent goods or services again; or
- (c) repairing the goods or paying the cost of repairing the goods.

10.3 The Customer indemnifies Fruitmark against all costs (including legal costs), expenses, damages, accounts or other losses or liability, including those arising from any actions, suits, proceedings, claims or demands, made against or suffered by Fruitmark, arising out of Fruitmark supplying the Goods or Services in accordance with these Conditions or arising out of the Customer breaching any of the Customer's obligations (which includes any negligent act or omission by the Customer or its agents) under these Conditions.

11. Intellectual Property

11.1 Ownership of all Intellectual Property Rights (other than third party Intellectual Property Rights) associated with the Goods or Services and any related documentation provided to the Customer pursuant to the Order belongs to and will vest in Fruitmark unless exempted specifically in writing.

11.2 Nothing stated in these Conditions shall be construed as an implied or express transfer of the Intellectual Property Rights to the Customer or any other party.

11.3 The Customer shall not use any of Fruitmark's Intellectual Property Rights including copyright, trademarks, logos, know-how and any other type of intellectual property belonging to Fruitmark without the prior written consent of Fruitmark.

12. Force Majeure

Without prejudice to any other provision hereof Fruitmark will not be liable for any failure to fulfil any terms of any agreement or inability to supply any Goods or Services if such fulfilment is delayed, hindered or prevented by any circumstances not within Fruitmark's direct control including without limiting the generality of the foregoing strikes or lock-outs, material shortages, Fruitmark's suppliers' failure to supply, labour disputes, war, hostilities or the threat or apprehension thereof or compliance with any order or request of any competent government authority or department or court of law.

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Date:

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Signing Officer: Signature

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Signing Officer: Name

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Company Name