



Ball Australia Pty Ltd

ABN 48 051 399 341

Terms and conditions of sale

These Terms are binding on You and Us in relation to each supply of Goods, from the time You place an order for Goods with Us.

1. Definitions and interpretation

1.1 Definitions

In these Terms:

Additional Charges means all taxes (including GST but excluding income tax), customs duty, sales tax, excise duty, stamp duty handling, delivery, packing, cartage and Our other charges, and any other charge, duty, fee, levy or impost, and any fine, penalty or interest payable in relation to a default by You.

Affected Person means the person affected by the event of Force Majeure.

Aggrieved Party means the person giving notice under clause 16(a).

Australian Consumer Law means the Australian Consumer Law as set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

Confidential Information of a person means:

- (a) all information owned by or relating to that person and relating to the business or affairs of that person or any associated entity of that person, including information relating to that person's business and financial affairs, marketing plans and strategies, customers or clients (including their identity, requirements, arrangements and contact people), suppliers (including their identity and arrangements), competitive strategies and position and personnel); and
- (b) which is by its nature confidential, is identified by that person as being confidential, or the person who receives it knows or ought to know is confidential.

Defective Goods means any Goods which have a safety defect (within the meaning of the Australian Consumer Law) or are otherwise not of acceptable quality (within the meaning of the Australian Consumer Law).

Force Majeure means an act beyond the reasonable control of the relevant person, including adverse weather, other climatic or environmental conditions, an act of God, a strike or other labour dispute, epidemic or pandemic, and civil disturbance.

Goods means the products or services supplied, or to be supplied, to You by Us as described the relevant invoice provided to You by Us.

GST means the tax payable under the GST Act.

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

PPSA means the *Personal Property Securities Act 2009* (Cth).

Return Authority means, in relation to particular Goods supplied, a document or electronic communication from Us authorising the return of those Goods to Us.

Returned Defective Goods means Goods returned to Us which are either:

- (a) Defective Goods; or
- (b) subject of a valid Return Authority.

Terms means these terms and conditions of sale.

We, Us or **Our** means Ball Australia Pty Ltd ACN 051 399 341.

You or **Your** means the person to whom We supply, or agree to supply, Goods.

1.2 Interpretation

In these Terms:

- (a) the singular includes the plural and vice versa;
- (b) where a word or phrase is defined, other grammatical forms of that word or phrase have a corresponding meaning;
- (c) a reference to legislation includes a reference to that legislation as amended or replaced from time to time, and includes any regulations made under it;
- (d) headings are for convenience only and do not affect the interpretation of these Terms;
- (e) no provision in these Terms will be construed adversely to a person solely on the ground that such person was responsible for its preparation;
- (f) a word or term defined in the *Corporations Act 2001* (Cth) has the same meaning in these Terms;
- (g) a word or term defined in the GST Act has the same meaning in these Terms where used in connection with the GST imposed under the GST Act; and
- (h) specifying anything after the words **including, includes, for example** or similar expressions does not limit what else is included unless there is express wording to the contrary.

2. Orders

- (a) You may place an order for Goods directly with Us by telephone, e-commerce, email or in person.
- (b) By placing an order, You acknowledge and agree that these Terms, as they exist at that time:
 - (1) apply and legally bind You and Us; and
 - (2) are fair and reasonable, as well as necessary to protect Our legitimate interests.
- (c) We may accept or reject an order from You in Our absolute discretion. We will endeavour to notify you promptly of acceptance or rejection, but an order is only accepted where we expressly communicate acceptance to you in writing, verbally or by Our conduct.
- (d) We are not bound by any additional term or condition set out in any order placed by You, unless it is expressly agreed in writing by Us.
- (e) You must ensure that You have in place at all times all necessary or desirable permits, consents, authorisations and other approvals in relation to the Goods and the supply and delivery of them to You.
- (f) Where You order Goods that are not within Our supply range at the time of the order:
 - (1) on Our acceptance of the order – We will invoice 80% of the total cost to You; and
 - (2) the remaining 20% of the total cost will be invoiced to You at the time of delivery.

3. Cancellation of an order

- (a) In relation to the cancellation of a seed order:
 - (1) where a cancellation request is received by Us at least 48 hours before scheduled dispatch – the cancellation is effective and You will not be charged for the order; or
 - (2) otherwise – the order cannot be cancelled.
- (b) In relation to the cancellation of a plug seed/vegetative order:
 - (1) where a cancellation request is received by Us before any step in the production of the order commences – the cancellation is effective and You will not be charged for the order; or
 - (2) otherwise – the order may be cancelled by You by giving Us written notice of cancellation, however, You will be responsible for paying Us 80% of the total cost of the order.

- (c) In relation to the cancellation of a tissue culture order:
- (1) where a cancellation request is received by Us at least 18 weeks before We receive the base tissue culture – the cancellation is effective and You will not be charged for the order; or
 - (2) where a cancellation request is received by Us within 18 weeks before the process of deflasking the tissue culture product and planting it onto cell trays has commenced – the order may be cancelled by You by giving Us written notice of cancellation, however, You will be responsible for the cost of the Goods but no production charges will apply; and
 - (3) where a cancellation request is received by Us less than 18 weeks before the process of deflasking the tissue culture product and planting it onto cell trays has commenced – the order may be cancelled by You by giving Us written notice of cancellation, however, You will be responsible for paying Us 80% of the total cost of the order but no freight charges will apply.

4. Price of Goods

- (a) Subject to clause 4(c), the price for Goods in an order will be Our quoted price for those Goods at the time You place the order.
- (b) We may change quoted prices for Goods to fairly reflect any underlying changes in manufacturing costs for those Goods at any time.
- (c) Where We change a quoted price under clause 4(b), We will endeavour to notify You, however changed prices will apply to:
 - (1) new orders You place after the date of the change whether or not you have received notice; and
 - (2) all orders You have placed before the date of the change but which have not yet been delivered to You.

5. Payment terms

- (a) Subject to clause 5(c) and any trade account terms You have agreed with Us in writing, You must pay Us for Goods supplied within 30 days of the end of the month in which those Goods are received by You..
- (b) Subject to clause 5(c), payment must be made by bank transfer/EFT or credit card payment by phone or through Our website.
- (c) If You are a cash or cash on delivery customer – You must pay for Goods ordered at the time of ordering.
- (d) Credit card fees will be applied at standard rates.
- (e) You must not set-off any amount owing by Us to You against any amount in an invoice for Goods.

- (f) If any amount payable by You is not paid by its due date, You must pay to Us interest on such amount at the equivalent of 2% per month.
- (g) Interest will accrue daily from the due date until the date such amount and all accrued interest is paid to Us by You.
- (h) If You fail to make payment in accordance with this clause 5 after the period of time (which will not be less than 7 days) specified in a written request for payment by Us, We may, without prejudice to any of Our other rights under these Terms or at law, do any or all of the following:
 - (1) suspend or cancel the shipment of any other orders placed by You, in which case moneys owing by You to Us in relation to that order will still be charged to Your account;
 - (2) require You to immediately pay to Us all amounts then owing by You to Us; and
 - (3) require You to make payment in advance in respect of any further orders.

6. Additional Charges

- (a) Unless otherwise agreed in writing between You and Us, all prices quoted for Goods are exclusive of all Additional Charges.
- (b) You must pay to Us in full, on demand, all Additional Charges in relation to Goods supplied to You or otherwise payable by You in relation to these Terms.

7. Delivery and pickup of Goods

- (a) Unless otherwise agreed between You and Us, We will, at Your expense, arrange delivery of Goods.
- (b) Delivery times advised by Us to You are estimates only and We will not be liable for any loss, damage or delay suffered or incurred by You, Your customers or any other person arising from late, partial or non-delivery of Goods, unless, the late, partial or non-delivery is due to Our misconduct or gross negligence.
- (c) Late or partial delivery of Goods does not entitle You to reject delivery of any Goods or make a claim against Us, including where late or partial delivery is caused by an act of Force Majeure. However:
 - (1) where rejection of an order is the only avenue by which You can avoid a material liability to a 3rd party in relation to Goods in that order – You may reject the relevant order; and
 - (2) where late or partial delivery is caused by Our misconduct or gross negligence, you are not prohibited from making a claim against Us.

- (d) Delivery at any time is subject to availability of stock, and We will not be liable for any loss, damage or delay suffered or incurred by You, Your customers or any other person arising from the unavailability of any Goods.
- (e) We are not liable for any loss or damage caused to Goods in transit unless the damage is due to Our misconduct or gross negligence.
- (f) Where We engage a 3rd party for a delivery, whilst We use reasonable care in choosing any such 3rd party, we do not accept responsibility for the conduct of that 3rd party in the delivery process, including in relation to any special conditions, such as refrigeration, that are required or would be beneficial to the relevant Goods. In this regard You should refer to clause 8(c).
- (g) We may make or arrange partial deliveries of any order, and each partial delivery will constitute a separate supply of Goods on these Terms.
- (h) Unless otherwise agreed between You and Us, You will be responsible for any packing costs as an Additional Charge. In this respect, We are entitled to charge You for any returnable containers and You must return returnable containers to Our premises within 60 days after You receive them.
- (i) You must ensure that the location at which Goods are to be delivered is fully accessible for delivery, and that it constitutes a safe and healthy site and complies with all applicable laws, codes of practice and standards including environmental and occupational health and safety requirements.
- (j) Unrooted cuttings shipped by Us to You by Express Post must be signed for by a representative of You. If there is no representative at the time of delivery, You must collect those Goods from the relevant post office, and sign for them, as soon as possible.
- (k) In relation to the pickup of Goods from Us:
 - (1) this may only occur through prior arrangements made with Us;
 - (2) whilst We will use due care in holding Goods prior to pickup by You, any deterioration in Goods occurring after any designated pickup time is at Your risk and is Your responsibility; and
 - (3) We may apply an Additional Charge of \$2 per tray per week (or part thereof) for Goods not picked up by the relevant designated pickup time.

8. Title and risk

- (a) Goods to be supplied by Us to You will be at Your risk immediately upon those Goods leaving Our premises or being picked up at Our premises for delivery to You.
- (b) Risk in particular Goods will remain with You at all times unless We retake possession of those Goods under these Terms.

- (c) Unless otherwise expressly permitted by Us, You must at Your cost insure Goods to be supplied to You against loss and damage and keep such insurance current until title to those Goods has passed to You under these Terms.
- (d) Title to particular Goods will pass to You only when full payment in cleared funds for those Goods and all associated Additional Charges is received by Us, and the Goods are delivered to You, whichever occurs last.
- (e) Monies received by Us from You will be applied against the amounts owed to Us by You in the date order in which they were incurred, with the oldest satisfied first.
- (f) Until particular Goods and all associated Additional Charges have been paid for in full by You:
 - (1) You may sell those Goods in the ordinary course of Your business as Our fiduciary;
 - (2) You may not:
 - (A) create or allow any interest in, or dispose or part with possession of, the Goods; or
 - (B) allow the Goods to be taken outside Australia;
 - (3) You may not assign Your right, title or interest in any book debts arising in Your favour in respect of Your sale of those Goods;
 - (4) You authorise Us and Our appointed representatives, at any time, to enter onto and occupy any premises where those Goods are located, without liability for trespass or other consequence, to enable Us to:
 - (A) inspect the Goods; and/or
 - (B) retrieve the Goods,

and You must promptly provide Us with access to all records relating to those Goods including any resale of those Goods. Our right to enter is without prejudice to any other rights We have under these Terms or at law.

9. Returns and other requests for credit

- (a) Subject to clause 8(b) and any agreement in writing between You and Us, Goods supplied may not be returned to Us unless:
 - (1) that return is permitted under the Australian Consumer Law, in which case the return may only occur in accordance with that permission; or
 - (2) the Goods are returned and accompanied by a valid Return Authority.
- (b) You should notify Us of any Goods which You believe are Defective Goods within 24 hours after supply to You. Any such notification must include photographs clearly

indicating the basis upon which you believe they are Defective Goods, and showing the relevant labels/tags or other evidence that the items originated from Us.

- (c) If we wish to inspect alleged Defective Goods, you must promptly provide all reasonable assistance to Us and/or our representatives, to facilitate that inspection.
- (d) Where Goods returned to Us are Returned Defective Goods, We are responsible for the costs of that return, otherwise You are responsible for the costs of that return (including freight and any insurance).
- (e) We will issue a credit adjustment note to You in respect of any Returned Defective Goods.
- (f) Notification of:
 - (1) short delivery or incorrect Goods supplied should be given to Us within 24 hours of You receiving the Goods;
 - (2) non-delivery of Goods should be given to Us within 24 hours of the expected delivery time; and.
 - (3) Any pricing or calculation errors should be given to Us within 7 days of the invoice date.
- (g) The provisions of this clause 9 do not extend to any Goods which have been added to, or varied by, any person other than Us.
- (h) This clause 9 has effect subject to law (including the Australian Consumer Law).

10. Warranty

- (a) You acknowledge and agree that the performance of Goods and their suitability for Your purposes will depend on various factors beyond Our control including the particular conditions under which they are stored or used, environmental factors, growing media, pests and diseases, and their use with or exposure to other goods.
- (b) You must take all reasonable steps to be satisfied that Goods You order will meet Your requirements.
- (c) To the full extent permitted by law, We expressly exclude all warranties, conditions and representations, whether express or implied, in relation to all Goods (including as to performance, quality or fitness for use or purpose, and any warranty or representation that Goods will be free from defects).
- (d) Certain legislation implies warranties or conditions or imposes obligations upon Us which cannot be excluded, restricted or modified except to a limited extent. To the extent to which We are able to do so, Our liability to You in relation to Goods and these Terms will be limited, at Our option, to:
 - (1) replacing Goods or supplying equivalent goods; and/or
 - (2) paying the cost of replacing the Goods or acquiring equivalent goods.

- (e) The total liability of Us to You (and any other person) for a breach of these Terms or in tort (including negligence) in connection with the supply of, or failure to supply, any Goods or otherwise under or in connection with the Terms (except for a liability arising due to the supply or provision of goods or services in breach of a condition or warranty implied by law into these Terms that cannot be lawfully excluded) is limited to the price payable for those Goods.
 - (f) This clause 10 has effect subject to law (including the Australian Consumer Law).
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11. Liability

- (a) To the full extent permitted by law, subject only to any express provision in these Terms, We will not be liable to You or any other person under any circumstances for any loss of use, profit, revenue, interest or goodwill, or for any injury or death to any person, or for any indirect, incidental or consequential damages suffered or incurred by You or any other person, whether such liability arises as a result of or in connection with:
 - (1) any negligent act or omission or wilful misconduct of Us or Our officers, employees, agents or contractors; or
 - (2) the supply, performance or use of any Goods.
 - (b) Without limiting the effect of clause 11(a), to the full extent permitted by law, We will not be liable for any damage to, or defects in, Goods caused by the improper storage, warehousing or transport, or by any neglect, abuse or improper use of Goods, by any person other than Us.
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12. Intellectual property

- (a) You acknowledge that, notwithstanding anything else in these Terms, all trademarks, copyright and other intellectual property rights embodied in or relating to Goods and any related documentation remain Our property at all times.
 - (b) You must not, at any time, without Our prior written consent, register or use any trademark, trade name, domain name, trading style or commercial designation or design used by Us in connection with the Goods, other than in the course of reselling Goods.
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13. Confidentiality

- (a) You must not, and You must ensure that Your related bodies corporate, and Your and Your related bodies corporate's officers, employees, agents and contractors, do not, use, copy or disclose to any person any information about Us (including Our Confidential Information, and any bespoke pricing or other arrangements agreed between You and Us) or relating to any Goods or obtained under or in connection with these Terms or any Goods except on a confidential basis and only the extent necessary to allow the Goods to be supplied.

- (b) Clause 13(a) does not prohibit the use, copying or disclosure of information:
 - (1) that is in or falls into the public domain otherwise than due to a breach of an obligation of confidence owed by any person to any other person; or
 - (2) to the extent necessary to allow You to comply with any applicable law or to enforce Your rights under these Terms.
- (c) We must not, and We must ensure that Our related bodies corporate, and Our and Our related bodies corporate's officers, employees, agents and contractors, do not, use, copy or disclose to any person any information about You (including Your Confidential Information) except on a confidential basis.
- (d) Clause 13(c) does not prohibit the use, copying or disclosure of information:
 - (1) that is in or falls into the public domain otherwise than due to a breach of an obligation of confidence owed by any person to any other person; or
 - (2) to the extent necessary to allow Us to comply with any applicable law or to enforce Our rights under these Terms.

14. Costs and expenses

- (a) If You breach any of these Terms, You must pay to Us on demand all costs, charges and expenses (including legal and collection costs on a full indemnity basis) incurred by Us in enforcing or attempting to enforce Our rights under these Terms or at law, or otherwise in connection with collecting or recovering Goods from or money owing by You.
- (b) A certificate prepared by Us in good faith and signed by Our authorised officer stating that a particular amount of money is owing to Us by You shall be *prima facie* evidence of the contents of that certificate in the absence of manifest error.

15. GST

- (a) You and We each warrant that it is registered under the GST Act and that it will remain registered during the Term.
- (b) If You or We make a taxable supply under these Terms, except where these Terms expressly state otherwise, the amount payable by the other for the taxable supply is expressed as a GST exclusive amount.
- (c) You or We (as relevant) must pay the amount of any GST payable in respect of the taxable supply on the date on which payment for the taxable supply is due.
- (d) Clause 15(c) does not oblige a person to pay the GST on a taxable supply to it, until that person is given a valid tax invoice for the supply.

16. Termination

- (a) Either You or We may terminate the agreement evidenced by these Terms immediately by notice to the other:
 - (1) if the other has failed to perform or observe any material obligation under these Terms (including, in the case of You, a failure to make any payment as and when required by these Terms) and the failure cannot be rectified, or the other has not rectified such failure within 14 days after the date it receives a notice from the Aggrieved Party requiring such failure to be rectified;
 - (2) where the other makes or provides any statement, information, representation or material which is misleading, deceptive, untrue or incorrect in a way which materially adversely affects the Aggrieved Party; or
 - (3) where:
 - (A) in the case of the other being a body corporate – the other becomes an externally- administered body corporate or has an application for winding-up filed against it; or
 - (B) in the case of the other being an individual – the other commits an act of bankruptcy or becomes an insolvent under administration.
- (b) We may at any time by giving not less than one month's notice to You terminate the agreement evidenced by these Terms.
- (c) Upon termination:
 - (1) any accrued obligation You or We have to pay the other any sum is unaffected; and
 - (2) any Goods already paid for by You must still be delivered by Us, and these Terms continue to apply in relation to that delivery.
- (d) Clauses 8(f), 10, 11, 13(b), 16(c), 16(d), 17 and 20 survive termination.

17. Enforcement

- (a) Without limiting any of Our rights under these Terms, if We are entitled to terminate the agreement evidenced by these Terms under clause 16, We may exercise any right or remedy under these Terms, the PPSA or applicable law, including enforcing any security interest in connection with these Terms and appointing any one or more persons as a receiver of all or any of the Goods or other assets the subject of any security interest created in connection with these Terms (including fixing the receiver's remuneration, removing a receiver, appointing an additional receiver and giving an indemnity).
- (b) Unless the terms of appointment restrict a receiver's powers, the receiver may do anything the law allows an owner of collateral to do (including under sections 420(1) and (2) of the *Corporations Act 2001* (Cth)).

- (c) To the extent permitted by law, You agree to dispense with any notice of or lapse of time before We or a receiver may exercise any right under this clause 17. However, if by law prior notice cannot be dispensed with or waived but the period of such notice can be agreed upon, then period of that notice is the longer of one day or the minimum period that the law allows to be agreed.

18. PPSA

- (a) You agree to do anything (such as obtaining consents, signing and producing documents, completing or arranging completion of documents, signing or arranging signing of documents, and supplying information) We reasonably request to:
- (1) ensure that any security interest arising in connection with these Terms is enforceable, perfected and otherwise effective and has priority over all other security interests; and
 - (2) enable Us to exercise Our rights in connection with any security interest arising in connection with these Terms.
- (b) To the extent permitted by law:
- (1) nothing in any of sections 125, 132(3)(d), 132(4), 135, 142 and 143 of the PPSA will apply to the agreement evidenced by these Terms, or any security interest arising under that agreement;
 - (2) You agree to waive and contract out of Your rights to receive any notice or statement under any of sections 95, 118, 121(4), 123, 130, 132(3)(d), 132(4) and 157 of the PPSA;
 - (3) You agree to contract out of each other provision of Part 4.3 of the PPSA, under sections 115(7) and 116(2), but only to the extent that the provision imposes obligations on Us; and
 - (4) neither We nor You will disclose any information of the kind mentioned in section 275(1) of the PPSA unless section 275(7) applies.
- (c) You must notify Us at least 7 days before You:
- (1) change Your name or Your place of registration or incorporation; or
 - (2) change or apply for an Australian Business Number,
- and You must notify Us if anything mentioned in this clause 18(c) occurs immediately upon becoming aware of it.

19. Force Majeure

- (a) If You or We are prevented in whole or in part from carrying out obligations under these Terms (other than an obligation to pay money) as a result of Force Majeure, the Affected Person must promptly notify the other. The notice must:
- (1) specify the obligations it cannot perform;

- (2) fully describe the Force Majeure;
 - (3) estimate the time during which the Force Majeure is expected to continue; and
 - (4) specify the measures proposed to be adopted to remedy and ameliorate the Force Majeure.
- (b) Following any such notice, and while the Force Majeure continues, the obligations which cannot be performed (other than an obligation to pay money) because of the Force Majeure, are suspended.
 - (c) The Affected Person must remedy and ameliorate the effect of the Force Majeure to the extent reasonably practicable and resume performance of its obligations as soon as reasonably possible.
 - (d) The Affected Person must take all action reasonably practicable to mitigate any loss suffered by the person who is not affected as a result of its failure to carry out its obligations under these Terms.

20. Regulatory compliance

- (a) You must not sell, divert, transfer, transact, or re-export Goods, directly or indirectly, to any individual, entity, or destination subject to any United States, European Union, or United Nations sanctions program, including the United States Department of Treasury's Office of Foreign Assets Control (**OFAC**) sanctions, and those listed on the OFAC specially designated nationals list.
- (b) Both You and We must comply with all applicable laws covering bribery, anti-corruption and anti-money laundering in any country in which We do business, including the Foreign Corrupt Practices Act (USA) under which it is unlawful to offer, pay or promise to pay money or anything of value to any foreign official to obtain or retain business.
- (c) You must provide all assistance reasonably requested by Us in relation to Us monitoring and investigating Our compliance with any regulatory regime noted in clause 20(a) or 20(b).
- (d) You must indemnify Us against any liability, loss, damage, cost or expense (including legal expenses) suffered or incurred directly or indirectly by Us in relation to a breach by You of any of clauses 20(a), 20(b) or 20(c).

21. Miscellaneous

- (a) A notice given under these Terms by Us or You is only valid if it is given in writing, signed by the person giving it or a duly authorised representative of that person, and received by You or Us in person, by registered mail, or by email.
- (b) A waiver granted by You or Us in relation to any of these Terms is binding only if it is given in writing and signed by an authorised representative of You or Us. A waiver by

You or Us of a right under these Terms does not affect any of Your or Our other rights under these Terms.

- (c) The agreement evidenced by these Terms may only be varied by written agreement between You and Us.
- (d) We may vary Our standard terms and conditions of sale at any time. If this occurs, in accordance with clause 2(b), the varied standard terms and conditions (which become the new Terms), apply to any new order placed by You. We will endeavour to notify You of any variation, however the varied standard terms and conditions will apply to new orders You place after the date of the change whether or not you have received notice.
- (e) The invalidity or unenforceability of any of these Terms will not affect the validity or enforceability of the remainder of these Terms.
- (f) These Terms are governed by the laws of the State of Victoria. You and We each submit to the non-exclusive jurisdiction of the Courts of Victoria and the Courts that may hear appeals from those Courts.
- (g) Subject only to clause 2(d), these Terms constitute the entire understanding and agreement of You and Us in relation to their subject matter, and supersede all prior negotiations, understandings and agreements between You and Us in relation to that subject matter. You and Us agree that except for the express provisions of these Terms, there is no other understanding, agreement, warranty, undertaking or representation whether express or implied which in any way extends or defines limits or otherwise relates to the express provisions contained in these Terms.
- (h) Nothing in these Terms constitutes the You and Us as partners or agents and neither has any authority to bind the other legally or equitably except as expressly stated in these Terms.
- (i) Both You and We must, at its own expense, do everything reasonably necessary to give effect to these Terms and the transactions contemplated by them, including the execution of documents
- (j) In giving approval, permission or any other form of consent, You and We must always act reasonably unless these Terms expressly provide otherwise.