

## Emergent Cold Pty Ltd (EC) - Standard Terms and Conditions

### 1. GENERAL CONDITIONS

#### 1.1 Operation

Any agreement by EC to transport Goods, store Goods or provide Services to the Customer is and remains subject to these EC standard terms and conditions ('Terms').

#### 1.2 Commencement

These Terms commence on the date they are first provided to the Customer (whether by way of website access [via www.emergentcold.com/locations/region/australia](http://www.emergentcold.com/locations/region/australia) Terms and Conditions Tab or otherwise), until superseded or replaced and the Customer agrees to be bound by these Terms in all dealings between the parties where credit is extended by EC pursuant to the Credit Application and Guarantee (as applicable).

#### 1.3 Discretion

EC may refuse to accept Storage, Transport or Services in respect of some or all of the Goods, or to carry out particular Services in its sole discretion.

#### 1.4 Transport Basis

EC is not a "common carrier" and does not accept any liability as a common carrier and may refuse to transport the Goods or any class of goods for any person.

#### 1.5 Risk

Subject to Clauses 9.2 and 9.9, the Storage, Transport and provision of Services (as applicable) in respect of the Goods is entirely at the risk of the Customer and save as expressly provided in the Contract, EC accepts no liability and will not be responsible for any claim, loss, damage, liability, cost or expense concerning the Goods whatsoever, other than to the extent the relevant cost or expense was caused directly by a breach of these Terms by EC.

#### 1.6 Details

- (a) The Customer hereby acknowledges and agrees that EC relies on the details of description, items, pallet space, quantity, weight, quality, value and measurement concerning the Goods as supplied by the Customer.
- (b) The Customer warrants the truth and accuracy of all the information that it provides to EC in connection with the Goods.
- (c) Without limiting the application of Clause 1.11, the Customer must at all times comply, and ensure that its personnel comply, with all applicable requirements of the Chain of Responsibility Legislation.

#### 1.7 Storage Media

- (a) Storage Media must be accounted for with control systems as specified in the Head Contract, or if not specified in the Head Contract, as specified in EC'

Storage Media policies as provided to the Customer or published on EC' website, and as amended from time to time.

- (b) EC reserves the right to recover from the Customer any costs and expenses incurred by EC as a result of or in connection with the Customer's deviation from the provisions in the Head Contract relating to Storage Media or EC' Storage Media Policies, or as a result of any changes to any Storage Media providers' hire rate.
- (c) No Storage Media costs will be accepted by EC where the date of original delivery documentation relating to Storage Media exceeds a period of 90 days from the date of presentation of *such costs* to EC. EC will not be responsible for the maintenance, repair or replacement of any Storage Media which is caused by normal wear and tear or is in any way caused, or contributed to, by the Customer or any of its personnel. The Customer is solely responsible for, and fully indemnifies EC against, any such costs and must pay such costs immediately to EC on demand.

#### 1.8 Included Stocktaking Service

If expressly provided for in the Contract or requested in writing by the Customer and accepted by EC, EC will conduct such stock counts of Customer Goods held by EC, at such times and on such terms as are agreed between the Customer and EC (including under the Head Contract). Any stock count which EC agrees to provide will be conducted by EC at the Customer's expense, unless the stock count is expressly provided for in the Head Contract and is included in the quoted rates.

#### 1.9 Loading Bays to be Used

- (a) The Customer must not load or unload any Goods or other materials from any vehicle at the Location unless the vehicle is parked in designated loading docks or other areas designated by EC for this purpose.
- (b) Without limiting the application of Clause 1.10, when loading or unloading any Goods or other materials from a vehicle as contemplated by clause 1.9(a), the Customer must comply, and ensure that its personnel comply, with all applicable requirements of the Chain of Responsibility Legislation, together with applicable EC policies and procedures and all reasonable instructions given by EC' authorised representatives from time to time.

#### 1.10 Use of Goods Entrances Required

The Customer must not convey any Goods or other materials to or from the Location except through the entrances and service areas provided for such purpose as directed by EC.

### 1.11 Compliance with laws

The Customer must comply, and ensure that its personnel comply, with all applicable laws including, without limitation, the Chain of Responsibility Legislation, the Cold Chain Guidelines, EC' occupational health and safety guidelines for the Location together with all other such EC policies and procedures relating to the management of the Location, and all reasonable instructions given by EC' authorised representatives from time to time.

### 1.12 Australian Quarantine Inspection Service

Without limiting the application of clause 1.11, the Customer must not do anything at the Location which would in any way prejudice the continuing use of the Location for the storage of food and must comply with all requirements of the Australian Quarantine Inspection Service ("AQIS") and any other body of competent jurisdiction. The Customer acknowledges that EC may receive and be required to act upon directions from AQIS officers in respect to the Goods or Services in order to comply with relevant regulatory and legislative requirements and acknowledges and agrees that EC will not be liable to the Customer for any loss or damage suffered by the Customer as a result of EC complying with this clause.

### 1.13 Shelf Life

- (a) Each time the Customer brings new Goods into Storage, the Customer must supply EC with full details of the provenance and expected shelf life of those Goods under the agreed storage conditions.
- (b) If EC provides the Customer with a list of Customer Goods which have been brought into Storage (including, for example, the details of the provenance and expected shelf life those Goods), the Customer is solely responsible for ensuring that the information contained in that list is correct and current and must, within 7 days after receipt of that list, notify EC of any changes or corrections which need to be made. If the Customer fails to notify EC of any changes or corrections to the list of Customer Goods within that 7 day period, the Customer will be deemed to have warranted to EC the accuracy of the information contained in that list.
- (c) The Customer will at all times remain responsible for ensuring that the Goods do not exceed their expected shelf life.

### 1.14 Quarantine

EC will be entitled but not obliged to quarantine any Goods that it considers have exceeded their shelf life and hold them separately from any remaining Goods of the Customer. EC will dispose of the relevant Goods in accordance with instructions in writing from the Customer (but subject always to the requirements of any applicable regulatory body) and at the Customer's sole cost and expense.

### 1.15 Dangerous Goods

If in the opinion of EC any Goods are, or are liable to

become, dangerous, inflammable, explosive, volatile, offensive or damaging in nature, EC may at any time without notice to the Customer and at the Customer's cost, destroy, dispose of, abandon or render them harmless without any liability or compensation to the Customer or any other Person, and without prejudice to EC' right to any Charges.

### 1.16 Method

If the Customer instructs EC to use a particular method of Storage, Transport or provision of Services, EC will give priority to that method but if EC cannot conveniently or lawfully adopt that method without incurring liability, costs, expenses or time, EC may use any method that it considers most appropriate in order to carry out the Storage, Transport or provision of Services and to comply with its obligations under the Contract.

### 1.17 Collection and Delivery of Goods

- (a) EC is not required to make Goods available to any person unless and until (i) all outstanding Charges in respect of those Goods have been paid, (ii) a receipt in respect of those Goods is signed by or on behalf of the Customer, and (iii) the Person seeking to collect those Goods, if not the Customer, tenders a proper authority signed by the Customer to EC.
- (b) EC will deliver the Goods to the address nominated by the Customer and accepted by EC. Delivery is deemed to have been made when EC receives a signed receipt or delivery docket, in paper or electronic form as determined by EC, from the Customer. If the address of delivery is unattended and EC elects to redeliver the Goods to the Customer, EC will charge the Customer and the Customer must pay the costs of re-delivery including any storage costs that EC may incur.
- (c) A receipt or delivery docket as contemplated by this Clause may be in paper or electronic form, as determined by EC.

### 1.18 Opening Goods

If any identifying document or mark is lost, damaged, destroyed or defaced, EC, without being liable to any person (including the Customer), may open any carton, wrapping, package or other container in which the Goods are placed or carried to inspect them either to determine their nature or condition or to determine their ownership.

### 1.19 Consolidation

EC may consolidate the Goods with others and, as principal or agent, may arrange for Storage, Transport or the provision of Services in respect of the Goods by any sub-contractor but on the same or similar terms as contained in these Terms.

## 2. CUSTOMER'S OBLIGATIONS

### 2.1 General Duties

The Customer must:

- (a) specify to EC the temperature requirements for the Goods during Storage and Transport and inform EC if any Goods tendered for Storage, Transport or the provision of Services are at a significantly different temperature than the temperature at which EC is required to store or transport them, or to provide Services, and pay any additional charge levied by EC for blast freezing or otherwise bringing them to their correct temperature, provided that the Customer must comply at all times with the Cold Chain Guidelines;
- (b) not tender for Storage, Transport or for the provision of Services, any volatile or explosive Goods or Goods which are or may become dangerous, inflammable or offensive (including radioactive materials) or which are or may become liable to damage any Person or property without first presenting to EC a full written description disclosing the nature of those Goods and thereafter presenting to EC such other information relating to those Goods as is requested by EC;
- (c) immediately notify EC of any change affecting the Customer, including any change to its address or any change in the Effective Control of the Customer;
- (d) in respect of Storage, unless otherwise agreed, give written notice to EC of its intention to collect any or all of the Goods from Storage prior to 2.00 pm on the previous Business Day; and in respect of Storage, if EC gives notice to the Customer requiring the Customer to remove any or all of the Goods from Storage, pay any Charges outstanding and then remove the Goods which are the subject of any such notice within the period of time specified in such notice (which will be a period of not less than 7 days after the date of notice).

## 2.2 Insurance Premiums

The Customer must pay when due all premiums for insurances to be effected by the Customer as provided in Clause 3 and will produce to EC on demand receipts for any such payments.

## 2.3 Costs of Services Consumed

The Customer must pay to its suppliers, when due, and fully indemnify EC against, all charges for Storage Media and other items or services consumed or used in relation to the Goods, Transport or Services and must comply with the lawful requirements and regulations of its various suppliers.

## 2.4 Delivery of Files

Following termination or expiration of the Contract, the Customer must immediately deliver to EC any and all of its records relating to any of the Customer's Goods which have not been removed from Storage.

## 2.5 No Nuisance

The Customer will not do or allow to be done anything which causes or may cause annoyance, nuisance, grievance, disturbance or damage to the Location or which interferes

with or could interfere with EC' continuing use of the Location as a cold storage facility.

## 3. INSURANCE

### 3.1 Insurance by Customer

The Customer must effect and maintain the insurances specified below (on terms that insurers will not by subrogation or otherwise have any rights to claim an indemnity from EC in respect of any claims or losses and with an acknowledgment of Clauses 4.2 and 10.1) with a reputable insurer:

#### (a) Public Risk

In respect of liability for loss, injury or damage of any kind to any Person or property (including without limitation to the persons or property of EC and its officers, employees, agents, other storage and transport customers, invitees and licensees) caused by or arising out of any act of or omission by the Customer or any Related Body Corporate of the Customer or any of their officers, employees, agents, other storage or transport customers, invitees and licensees in relation to the Goods in the sum of \$20,000,000.00 (or such other amount as is stated in the Contract) in respect of any single accident or event, provided that EC may from time to time by written notice to the Customer require the amount of insurance to be increased to the amount EC considers reasonable in order to effect sufficient and proper cover (as determined by EC).

#### (b) The Goods

All of the Goods against damage or destruction by the Insured Risks (including any other insurable risks required by the Customer) for their full insurable value on a replacement or reinstatement basis including any costs of reinstatement or replacement.

#### (c) Accident Compensation

In respect of worker's compensation in respect of all employees or eligible contractors of the Customer who may attend the Location for any reason, for full legal liability or the Customer must obtain written approval by EC (not to be unreasonably withheld) to act as a self-insurer for such risks.

### 3.2 Delivery of Policies

The Customer must:

- (a) upon request by EC, deliver copies of the certificates of currency in respect of the insurances specified in Clause 3.1 to EC prior to delivery of the Goods or Services and otherwise as requested by EC from time to time; and
- (b) punctually pay all premiums payable for the renewal of those insurances as they become due and payable and produce and deliver to EC on or before the respective renewal dates and without demand the receipts for those premiums.

### 3.3 Warranty as to Convictions

The Customer warrants that before entering into the Contract it has disclosed to EC and in the future will immediately disclose to EC in writing any conviction, judgment or finding of any court or tribunal relating to the Customer or any Related Body Corporate of the Customer, or any director, other officer or major shareholder of the Customer or any Related Body Corporate of the Customer, of such a nature as to be likely to affect the decision of any insurer or underwriter to grant or to continue insurance of the Location or for any Storage, Transport or Services against any of the Insured Risks.

### 3.4 Requirements of Insurers

The Customer must comply with all reasonable requirements and recommendations of EC or its insurers regarding the management of risks.

### 3.5 Notice of Events Affecting the Policy

The Customer must give immediate notice to EC of any event that may affect any insurance policy of EC as notified to the Customer and any event against which EC may have insured.

### 3.6 Other Insurance

If at any time the Customer is entitled to the benefit of any insurance of the Goods that is not effected or maintained pursuant to the Contract, the Customer must apply all money received by virtue of that insurance in making good the loss or damage in respect of which the money is received.

## 4. CUSTOMER'S WARRANTIES AND INDEMNITIES

### 4.1 Warranties

The Customer and the person tendering the Goods for Storage, Transport or Services each warrant that:

- (a) they have fully and adequately described and labelled all of the Goods as to their nature, weight, measurements, provenance, expected shelf life and lot number and have complied with all applicable laws and regulations concerning the Goods including about the notification, classification, description, labelling, transport, packaging and storage of the Goods and given their nature the Goods are packed in a proper way to withstand the ordinary risks of Storage, Transport and the provision of the Services;
- (b) the person delivering or collecting the Goods to or from Storage, Transport or the Services is authorised so to do by the Customer and (if applicable) to sign for any delivery or collection document on behalf of the Customer;
- (c) they are either the owner or the authorised agent of the owner of the Goods;
- (d) the Goods are free from any encumbrance, charge, lien or any other Security Interest;

- (e) the Goods are and will remain free of any objectionable matter or odours that may affect other goods in transit, unless the condition of the Goods has previously been notified in writing to EC and EC has expressly accepted the Goods in that condition in writing;
- (f) the Goods will be delivered to EC at the specified or agreed temperature and in accordance with the Cold Chain Guidelines;
- (g) they have not asked, and will not ask, EC to handle or transport the Goods in any way that could be unlawful; and
- (h) they will not tender for collection any volatile or explosive Goods which are or may become dangerous, inflammable or offensive or which are or may become liable to damage any person or property without first presenting to EC a full written description disclosing the nature of those Goods, and EC has expressly accepted the Goods in that condition in writing.

### 4.2 Indemnity

The Customer fully indemnifies EC against all loss, damage, cost or expense (including legal costs on a full indemnity basis) that may be suffered or incurred by or awarded against EC as a result of any:

- (a) loss of or damage to any physical property or physical injury to or death of any person caused, or contributed to, by any act or omission of the Customer, any Related Body Corporate of the Customer, or any of their employees, agents, officers or subcontractors; or
- (b) breach by the Customer of any provision of the Contract; or
- (c) any false, misleading or deceptive conduct of the Customer.

This Clause will survive termination of the Contract.

## 5. CHARGES

### 5.1 Payment

The Customer must:

- (a) unless otherwise agreed in writing, pay EC the Charges within 14 days after the date of EC' invoice; and
- (b) in addition to the Charges, the Customer must pay the following amounts to EC (or as directed by EC) immediately on demand:
  - (i) any expenses not recouped out of the proceeds of sale of the Goods under Clause 6.2;
  - (ii) all costs and expenses incurred by EC in order to ensure compliance with any law or regulation or any order or requirement made under them or with the requirement of any

quarantine service, trade association, market, harbour, dock, railway, shipping, customs, excise or warehouse authority or other person by reason of the Storage, Transport or the provision of Services in respect of the Goods;

- (iii) any applicable customs duty, excise duty and costs (including any fine or penalty);
- (iv) all charges relating to a stock count conducted by EC pursuant to Clause 1.8;
- (v) any storage charges or other charges or expenses EC incurs in relation to the Goods (including without limitation salvage costs and additional freight and storage costs);
- (vi) all costs and expenses incurred by it in connection with the Customer's delay;
- (vii) any additional costs and expenses EC incurs as a result of any incorrect declaration by the Customer of the weight, volume, description or packaging of the Goods;
- (viii) any cost expense, loss or liability incurred by EC in connection with any destruction or disposal under Clause 1.15, or any opening or inspecting under Clause 1.18;
- (ix) any present or future imposed taxes, levies or other Government charges or imposts payable on or in respect of the Services provided under the Contract;
- (x) any cost, expense or loss to EC' property or any person caused or contributed to by the Goods; and
- (xi) if the Goods are at any time re-quantified, re-weighed or reassured, any proportional additional Charges in relation to the Goods.

- (c) The Customer must pay any amounts owing to EC under clause 5.1 in full without set-off, counterclaim or deduction and otherwise in cleared funds.

## 5.2 Accrual

EC' Storage Charges accrue for payment as soon as the Goods are delivered to EC or collected by EC (as applicable) and whether the Goods are collected by the Customer or not and whether the Goods are damaged or not.

## 5.3 Interest on Default

The Customer will pay to EC on demand interest calculated at the Interest Rate on any Charges or other money payable by the Customer which remain unpaid for 7 days after the due date for payment, such interest to be calculated from and including the relevant due date and to accrue on a daily basis until paid.

## 5.4 Increase in Charges

The Charges may be increased in accordance with the Rate Review formula set out in the Contract effective on either the Contract anniversary date, or the 1<sup>st</sup> January each year.

If there is no contract in place between the parties, then the Emergent Cold Pty Ltd (EC) – Standard Terms and Conditions apply and rates can be amended from time to time at the discretion of Emergent Cold as notified in writing.

## 6. LIEN

### 6.1 General Lien

EC has both a specific and general lien on the Goods held by EC and any documents relating thereto and on any other goods of the Customer in EC' possession from time to time and in priority to any other Security Interest for all Charges or other moneys due under the Contract or which become due on any account whether for Storage, Transport or the provision of Services in respect of the Goods or any other goods or any other EC service.

### 6.2 Disposal

If the Charges or any other amounts payable to EC under the Contract are not paid when due, or the Goods are not collected when so required or designated, EC may after the giving of notice in accordance with Clause 7.2, and in the case of perishable Goods immediately, do one or more of the following:

- (a) remove all or any of the Goods and store them as EC thinks fit at the Customer's risk and expense;
- (b) open and sell all or any of the Goods as EC thinks fit and apply the proceeds to discharge the lien and costs of sale without being liable to any Person for any loss or damage caused; or
- (c) deduct or set-off from any moneys due from EC to the Customer under any contract, debts and moneys due from the Customer to EC under the Contract or under any other contract.

## 7. TERMINATION AND DEFAULT

### 7.1 Default

EC may terminate the Contract in accordance with Clause 7.2 if:

- (a) the Customer does not pay the Charges or any other amounts payable to EC under the Contract or meet its other obligations under the Contract;
- (b) the Customer or the Guarantor becomes insolvent, an order is made or a resolution is passed to wind it up, it goes into liquidation or has a provisional liquidator appointed, is placed under official management, has a receiver or receiver and manager appointed over any of its assets or an administrator appointed or any similar event occurs in relation to the Customer or the Guarantor; or
- (c) the Customer or the Guarantor is a natural person and:
  - (i) commits an act of bankruptcy as defined in the *Bankruptcy Act 1966 (Cth)*;
  - (ii) becomes bankrupt;

- (iii) takes or tries to take advantage of Part X of the *Bankruptcy Act 1966 (Cth)*; or
- (iv) enters into a composition or arrangement with or makes an assignment for the benefit of their creditors.

## 7.2 Termination after Default

If EC has given 7 days prior written notice to the Customer that:

- (a) the Customer has defaulted under the Contract as provided in Clause 7.1; and
- (b) the Customer fails within such period to remedy the default (if it is capable of remedy) or compensate EC for the default (in each case, to the satisfaction of EC),

then EC may terminate the Contract immediately by written notice to the Customer, the termination taking effect from the date of giving the notice.

## 7.3 Period for Remedy

The period of 7 days is agreed by EC and the Customer as a reasonable period within which the Customer must remedy a breach capable of remedy under the Contract or compensate EC, as contemplated by Clause 7.2.

## 7.4 Termination on notice

EC may at any time terminate the Contract by giving 90 days prior written notice to the Customer.

## 7.5 Goods Left in Store

Without limiting the application of Clause 6, if the Customer leaves Goods in Storage after the Contract has been terminated then EC may either dispose of the Goods at the Customer's expense and with no liability to EC or, at EC's sole discretion, continue to store the Goods for the same Charges and under the same terms and conditions (with the necessary changes made) as those contained in the Contract until the Goods are collected by the Customer or otherwise disposed of.

## 7.6 Acceptance of Charges

Acceptance of Charges by EC after default by the Customer under the Contract will be without prejudice to the exercise by EC of the powers conferred on it by Clauses 7.2 and 7.4 or any other right, power or privilege of EC under the Contract or at law and will not operate as an election by EC either to exercise or not to exercise any of those rights, powers or privileges then or on any subsequent breach.

## 8. CONSEQUENCES OF TERMINATION

### 8.1 Complete Instructions

EC will, subject to the terms of the Contract, fulfill any reasonable instructions by the Customer with respect to the Goods prior to the termination of the Contract, subject however to EC obtaining such security or guarantee of payment and performance by the Customer as EC

considers, in its reasonable opinion, appropriate in the circumstances.

### 8.2 Pay Moneys Owning

Neither the expiration or termination of the Contract will release the Customer from the obligation to pay any sums owing to EC or from the obligation to perform any other duty or to discharge any other liability that may have been incurred by the Customer prior to the expiration or termination of the Contract.

### 8.3 Provisions surviving termination

Clauses 4 (Warranties and Indemnities), 7 (Termination and Default), 8 (Consequences of Termination), 9 (Loss or Damage), 10 (Exclusions and Limitations), 15 (Confidentiality), 17 (General) and 18 (Definitions and Interpretation) survive the termination or expiry of the Contract.

## 9. LOSS OR DAMAGE

### 9.1 General Exclusion of Liability

- (a) Subject to Clauses 9.2 and 9.9, EC will not be liable for any liability, cost, expense, loss or damage suffered by the Customer or any other person, howsoever caused or arising, whether an authorised or unauthorised act under the Contract and whether caused by the negligence of EC or its officers, employees, agents, subcontractors or otherwise in any way arising out of or in connection with the Storage, the Transport or the provision of Services in respect of the Goods or in connection with the Contract.
- (b) Notwithstanding anything to the contrary in the Contract, in no circumstances will EC be liable for any special, indirect or consequential loss suffered or incurred by the Customer or any other Person (including, without limitation, any loss of profit, revenue, business contracts or anticipated savings).

### 9.2 Limitation

If rights are conferred upon the Customer, or any other Person, or obligations are imposed upon EC by any applicable legislation which cannot be excluded, restricted or modified, the provisions of Clause 9.1 shall be read subject to those rights or obligations. Subject to Clause 9.9, EC expressly limits its liability under any such legislation to the maximum extent permitted by law.

### 9.3 Notice of Loss or Damage

Without limiting Clauses 9.1 and 9.2, no claim for loss of or damage to the Goods may in any event be made against EC unless notice of the claim in writing is received by EC within 7 days after the date of removal of the Goods or the relevant part of them from Storage or the date of Transport or the provision of Services and to the extent permitted by law all claims not so made within the time will be deemed to have been waived.

#### 9.4 Failure to Notify

The failure to notify a claim within the time under Clause 9.3 is evidence of satisfactory performance by EC of its obligations.

#### 9.5 Failure to Bring Action

Despite Clause 9.3, EC will be discharged from all liability for loss of or damage to the Goods unless an action is brought within six months of the date of removal of the Goods (or the relevant part of them) from Storage or the date of Transport or provision of the Services.

#### 9.6 Ullage Acknowledgment

- (a) The Customer acknowledges that despite all reasonable care and attention on the part of EC, damage and/or loss of Goods can sometimes occur through storage, handling & transportation (**Ullage**).
- (b) The Customer agrees that except to the extent required by law and except where Clause 9.9 applies, EC will have no liability to the Customer for Ullage as the Parties have taken this into account in negotiating the pricing for Storage, Transport and the Services (as applicable) in accordance with the Contract.

#### 9.7 No Claims against EC

To the extent permitted by law and without limiting the application of the other provisions of this Clause 9, EC will not be liable in respect of all or any part of any adjustments allowed or payments made by the Customer to any third party or other person unless the Customer will have first received approval in writing from EC for such adjustments or payments.

#### 9.8 Acknowledgement

Without in any way limiting and subject to the preceding provisions of this Clause 9, and to the extent permitted by law:

- (a) the Customer acknowledges and accepts that due to the nature of the storage processes, chilled and frozen goods may show variations in quality, weight, measurements, shades, tints and colours; and
- (b) EC will not be bound to make good any defect in Goods if:
  - (i) the defect is caused as a result of the information provided by the Customer to EC;
  - (ii) the defect is caused as a result of the Goods having been subjected to misuse, neglect or damage by the Customer or any of its personnel; or
  - (iii) the defect is caused as a result of the Customer not following an appropriate regime to maintain the condition of the Goods, or is caused, or contributed to, by any act or omission of the Customer or any of its personnel.

#### 9.9 Maximum Liability

- (a) Any representation, warranty, condition or undertaking that would be implied in the Contract by legislation, common law, equity, trade, custom or usage is excluded to the maximum extent permitted by law.
- (b) Nothing in the Contract excludes, restricts or modifies any condition, warranty, right or remedy conferred on the Customer by the Australian Consumer Law or any other applicable law that cannot be excluded, restricted or modified.
- (c) If the Customer is a Consumer and the Customer has suffered or incurred any liability, loss, cost or damage (for the purpose of this Clause 9.9, "**Loss**") because of a failure of EC to comply with a Consumer Guarantee, EC' liability for such Loss (which cannot be limited beyond the following provisions contained in this Clause 9.9) is limited to:
  - (xii) in the case of defective Goods, any one or more of the following (at EC' option):
    - a. replace the Goods or supply equivalent goods; or
    - b. pay the costs of replacing the Goods or of acquiring equivalent goods; and
  - (xiii) in the case of defective Services, any one or more of the following (at EC' option):
    - a. supply the Services again; or
    - b. pay the costs of having the Services supplied again.

Except as provided in Clause 9.2 and this Clause 9.9 and as required by law, no other warranty or condition, express or implied will apply under the Contract.

#### 9.10 Demurrage

The Customer agrees that EC will not be liable to compensate the Customer for demurrage or any associated loss or damage arising from loading, unloading or storing the Goods.

### 10. EXCLUSIONS AND LIMITATIONS

#### 10.1 Release and Indemnity

The Customer hereby releases EC from and fully indemnifies and holds EC harmless against:

- (a) all losses, damage, costs and expenses (including, without limitation, special, indirect and consequential loss (including, without limitation, any loss of profit, opportunity, revenue, business contracts or anticipated savings)) suffered or incurred by EC in connection with the Goods, the Storage, the Transport or the Services, even if notified of the possibility of that potential loss or damage and irrespective of whether it is due to negligence, breach of contract or any other cause; and
- (b) any claims made by any person against EC in respect of:

- (i) any losses, damage, costs and expenses (including, without limitation, any loss of profit, revenue, business contracts or anticipated savings) suffered or incurred by that (or any other) person;
- (ii) any loss of or damage to any property owned by that (or any other) person; and
- (iii) any injury to, or death of, any person,

in each case in connection with the Goods, the Storage, the Transport or the Services (including any delay or other failure to supply the Storage, the Transport or the Services) or any breach of the Contract by the Customer.

## 10.2 Force Majeure

- (a) EC will not be liable for any direct, consequential, special or indirect loss (including loss of profits) or damage to the Goods or otherwise suffered by the Customer arising from non-performance or late performance of the Contract by EC caused by Force Majeure.
- (b) If EC is wholly or partially prevented from performing its obligations under the Contract by a Force Majeure event, then the obligation to perform in accordance with the Contract will be suspended for the duration of the Force Majeure event.
- (c) If the Force Majeure event (and consequential inability to perform the Contract) continues for a period longer than 7 days from its initial occurrence, then either the Customer or EC may terminate the Contract by written notice to the other. Such notice will not prejudice any rights or obligations either Party may have accrued prior to such termination.

## 10.3 EC Sub-Contractors & Employees

The Customer agrees that every EC sub contractor, agent, officer and employee of EC is entitled to the full benefit of the indemnities, exclusions and limitations of liability set out in the Contract which are for the benefit of EC, to the same extent as EC.

## 10.4 Breach

Notwithstanding any breach by EC of any terms of the Contract, all the rights, immunities and limitations of liability in the Contract continue to have their full force and effect in all circumstances.

## 11. INTELLECTUAL PROPERTY RIGHTS

### 11.1 Off-Site Access to EC IT Systems

- (a) If EC agrees to provide the Customer with access (by any means EC determines) to EC IT Systems then the Customer must enter into a separate software licence for the EC IT Systems in such form as EC will require and will only utilise such access

for the purpose of viewing the data and reports identified in that licence.

- (b) In the event that EC provides the Customer with such access to EC IT Systems then the Customer will be responsible for all the costs incurred in setting up such access.
- (c) Without limiting the application of Clause 15, the Customer will keep all EC IT Systems, telephone numbers and access codes strictly confidential and ensure that all its staff members who are given access to this information are bound by enforceable confidentiality covenants in favour of EC in respect of the same. If the Customer becomes aware of any breach of confidentiality then the Customer must immediately notify EC' General Manager IT in writing.

### 11.2 Ownership of Intellectual Property Rights

The Customer acknowledges and agrees that each Intellectual Property Right is owned or entitled to be owned by EC or a Related Body Corporate of EC.

### 11.3 Use of EC Trade Identification

Until expiry or termination under the Contract, EC grants to the Customer, a non-exclusive right to use the EC Trade Identification in relation to any advertising or other promotional activities carried out by the Customer in respect of any Goods.

### 11.4 Infringement

The Customer must:

- (a) notify EC in writing as soon as practicable of any infringement, suspected infringement or alleged infringement of EC' intellectual property in EC IT Systems;
- (b) allow EC to conduct any claim, including negotiations for settlement or compromise prior to the institution of legal proceedings;
- (c) provide EC with reasonable assistance in conducting the defence of such a claim;
- (d) permit EC to modify, alter or substitute any infringing part of EC IT Systems at its own expense in order to avoid infringement, or authorise EC to procure for the Customer the authority to continue the use and possession of any infringing programs;
- (e) only use the Intellectual Property Rights in accordance with the reasonable written directions of EC (including directions relating to reproducing the EC Trade Identification on websites or any other forum);
- (f) at all times maintain the distinctiveness of and reputation associated with the EC Trade Identification as reasonably required by EC;
- (g) immediately notify EC of, and comply with EC' directions in relation to, any issue, claim, demand, threat, notice of proceedings or cause of action (whether contingent, accrued or otherwise) against



or involving the Customer relating to any Intellectual Property Rights; and/or

- (h) do all other acts and things that may be reasonably required by EC to ensure the protection of the Intellectual Property Rights.

#### 11.5 Prohibited Acts

The Customer must not:

- (a) use EC IT Systems in combination by any means and in any form with other programs not specifically approved by EC;
- (b) use EC IT Systems in a manner or for a purpose not reasonably contemplated or not authorised by EC;
- (c) modify or alter EC IT Systems without the prior written consent of EC;
- (d) enter into any transaction relating to EC IT Systems without EC' prior consent in writing;
- (e) license any of the Intellectual Property Rights to or allow the use of any of the Intellectual Property Rights by any other person in any circumstances; or
- (f) use the EC Trade Identification in conjunction with or as part of any other trade marks, names or words, without the prior written consent of EC.

#### 11.6 Indemnity

The Customer hereby fully indemnifies EC against any losses, costs, expenses, demands or liability, whether direct or indirect, arising out of a claim by a third party alleging such infringement if:

- (a) the claim arises from an event specified in Clause 11.4; or
- (b) the ability of EC to defend the claim has been prejudiced by the failure of the Customer to comply with any requirements of Clause 11.5.

### 12. SUBCONTRACTING

#### 12.1 Independent Contractors

EC may sub-contract responsibility for all or part of the Services, Storage or Transport to independent sub-contractors from time to time with the prior written consent of the Customer (such consent not to be unreasonably withheld or delayed). In case of such sub-contracting, EC' duty to the Customer will be limited to using reasonable endeavours to appoint a suitable sub-contractor.

#### 12.2 Security and Pest Control

The Customer acknowledges that as part of its normal business method EC employs independent security, pest control and other such sub-contractors and that the Charges and the Parties' respective insurance obligations have been determined on this basis.

### 13. APPOINTMENT AS AGENT

The Customer for valuable consideration irrevocably appoints EC and any EC officer jointly and severally its agent (with power to appoint a substitute or substitutes and

to remove any of them) to act at any time after termination of the Contract on behalf of the Customer to deal with any Goods left in Storage and to execute a variation or termination of the Contract and generally to execute any document and do or perform any act or thing in respect of the Goods as fully and effectually as the Customer could do and the Customer will ratify and confirm anything the agent or any substitute may lawfully do or cause to be done.

### 14. PERSONAL PROPERTY SECURITIES ACT

- (a) The Customer acknowledges that under the Contract the Customer grants a Security Interest(s) to EC, including but not limited to, the lien in Clause 6. The Customer acknowledges that the Contract constitutes a Security Agreement for the purposes of the PPS Act.
- (b) The Guarantor acknowledges that under the Guarantee the Guarantor grants a Security Interest(s) to EC, including (without limitation) a charge over all its property. The Guarantor acknowledges that the Guarantee constitutes a Security Agreement for the purposes of the PPS Act.
- (c) If there is a Security Interest in favour of the Customer or the Guarantor and the Customer or the Guarantor proposes to register the Security Interest under the PPS Act, the Customer or the Guarantor (as applicable) must give EC written notice prior to the registration that the Customer or the Guarantor (as applicable) proposes to register the Security Interest.
- (d) The Customer and the Guarantor will do anything reasonably required by EC to enable EC to register its Security Interests, with the priority EC requires, and to maintain the registration.
- (e) The Security Interests arising under the Contract or the Guarantee attach to the Collateral in accordance with section 19(2) of the PPS Act and the parties confirm that they have not agreed that any Security Interest arising under the Contract or the Guarantee attaches at any later time.
- (f) The Customer and the Guarantor each acknowledge that EC may perfect its Security Interests by lodging a Financing Statement on the Personal Property Securities Register.
- (g) To the extent that any of the enforcement provisions of Chapter 4 of the PPS Act apply to the Security Interests created under or referred to in the Contract or the Guarantee, the following provisions of the PPS Act will not apply:
  - (i) section 95 (notice of removal of accession), to the extent that it requires the secured party to give a notice to the grantor;
  - (ii) subsection 121(4) (enforcement of liquid assets – notice to grantor);

- (iii) section 130 (notice of disposal), to the extent that it requires the secured party to give the grantor a notice;
- (iv) paragraph 132(3)(d) (contents of statement of account after disposal);
- (v) subsection 132(4) (statement of account if no disposal);
- (vi) section 135 (notice of retention);
- (vii) section 142 (redemption of collateral); and
- (viii) section 143 (reinstatement of security agreement).

- (h) EC does not need to give the Customer or the Guarantor any notice under the PPS Act (including a notice of a Verification Statement) unless the notice is required by the PPS Act and that requirement cannot be excluded.
- (i) The parties agree that neither party will disclose to an "interested person" (as defined in section 275(9) of the PPS Act) or any other person, any information of the kind described in section 275(1) of the PPS Act. The Customer and the Guarantor will not authorise the disclosure of any information of the kind described in section 275(1) of the PPS Act.

## 15. CONFIDENTIALITY

### 15.1 Confidentiality obligations

The Customer must:

- (a) keep confidential, and not use or disclose, any Confidential Information, except as permitted by the Contract; and
- (b) immediately notify EC if it becomes aware of any loss or unauthorised use, access, copying or disclosure of any Confidential Information.

### 15.2 Permitted use and disclosure

- (a) The Customer may, to the extent necessary:
  - (i) use Confidential Information for the purposes of performing the relevant obligations or exercising the relevant rights arising under or pursuant to the Contract; and
  - (ii) subject to Clause 15.2(b), disclose Confidential Information to its personnel and financial and legal advisers who have a specific need to access that Confidential Information for the purpose of performing the relevant obligations or exercising the relevant rights arising under or pursuant to the Contract.
- (b) The Customer must ensure that a person to whom it discloses Confidential Information under the Contract does not make public or disclose the Confidential Information.

## 15.3 Exclusions

The obligations in Clause 15.1 do not apply to:

- (a) any disclosure made with EC' prior written consent, which can be withheld in its discretion and may be given subject to conditions;
- (b) any disclosure required by law (including any order of a court of competent jurisdiction); and
- (c) information which is, at the relevant time, in the public domain other than as a result of a breach of this Clause.

## 16. GST

- (a) Words used in this Clause 16 that have a defined meaning in the *A New Tax System (Goods and Services Tax) Act 1999 (Cth) (GST Law)* have the same meaning as in the GST Law unless the context indicates otherwise.
- (b) EC' quoted charges and EC' Rates represent the GST exclusive value of the supply for GST purposes.
- (c) To the extent that any supply made under or in connection with the Contract is a taxable supply, the recipient must pay, in addition to the amounts provided under the Contract for that supply (supply charge) an amount (additional amount) equal to the amount of the supply charge (or its GST exclusive market value) multiplied by the rate at which GST is imposed in respect of the supply. The Customer must pay the additional amount at the same time as the supply charge to which it is referable.
- (d) Whenever an adjustment event occurs in relation to any taxable supply to which Clause 16(c) applies:
  - (i) EC must determine the amount of the GST component of the charges payable; and
  - (ii) if the GST component of the charges payable differs from the amount previously paid, the amount of the difference must be paid by, refunded to or credited to the Customer, as applicable.
- (e) EC will issue a tax invoice to the Customer of a supply to which Clauses 16(b), (c) and (d) applies no later than 7 days following payment of the GST inclusive consideration for that supply under that clause.
- (f) If either Party is entitled under the Contract to be reimbursed or indemnified by the other Party for a cost or expense incurred in connection with the Contract, the reimbursement or indemnity payment must not include any GST component of the cost or expense to the extent that the cost or expense is the consideration for a creditable acquisition made by the party being reimbursed or indemnified, or by its representative member.

## 17. GENERAL

### 17.1 Governing Law and jurisdiction

The Contract is governed and must be construed under the laws of the State of Victoria, Australia and will be determined non-exclusively by the courts of Victoria.

### 17.2 Severability

Any provision of these Terms which is invalid in any jurisdiction must, in relation to that jurisdiction:

- (a) be read down to the minimum extent necessary to achieve its validity, if applicable; and
- (b) be severed from these Terms in any other case,

without invalidating or affecting the remaining provisions of these Terms or the validity of that provision in any other jurisdiction.

### 17.3 Assignment

Rights arising out of or under the Contract are not assignable by the Customer without the prior written consent of EC.

### 17.4 Variation

A variation of any term of the Contract must be in writing and signed by the Parties.

### 17.5 Formalities

EC is not bound by any waiver, discharge or release of a term or condition or any agreement which varies the Contract unless it is in writing and signed for EC by a director.

### 17.6 Waiver

If EC waives a breach of a term or condition the waiver does not operate as a waiver of another breach of the same or any other condition or as a continuing waiver.

### 17.7 Rights Cumulative

The rights powers and remedies under the Contract and conditions are cumulative with the rights, powers or remedies provided by law independently of the Contract.

### 17.8 Entire understanding

- (a) The Contract contains the entire understanding between the parties concerning the subject matter of the Contract and supersedes all prior communications between the parties. In particular these Terms supersede all terms or conditions submitted by the Customer, which will not apply to the provision of Goods except to the extent expressly agreed by EC in writing.
- (b) Each party acknowledges that, except as expressly stated in the Contract, that party has not relied on any representation, warranty or undertaking of any kind made by or on behalf of another party in relation to the subject matter of the Contract.

## 18. DEFINITIONS AND INTERPRETATION

### 18.1 Definitions

In this Contract:

**“Australian Consumer Law”** means Schedule 2 to the *Competition and Consumer Act 2010* (Cth) and the corresponding provisions of the *Australian Consumer Law and Fair Trading Act 2012* (Vic), as applicable;

**“Business Day”** means any day other than a Saturday, Sunday or Public Holiday in Melbourne, Australia;

**“Chain of Responsibility Legislation”** means applicable transport and chain of responsibility legislation;

**“Charges”** mean EC’ charges for Storage, Transport and Services calculated at the rates set out in the Contract (increased in accordance with the Contract or Clause 5.4, or both of them) or if not specified then at EC’ Rates, the other moneys referred to in Clause 5 and GST;

**“Cold Chain Guidelines”** means The Australian Cold Chain Guidelines 1999, as amended, consolidated, supplemented or replaced from time to time;

**“Collateral”** has the same meaning as in the PPS Act;

**“Confidential Information”** means the Contract and all other information regardless of its form:

- (a) that is disclosed directly or indirectly by EC to the Customer; and
- (b) that is treated or designated as confidential by EC or the Customer knows, or ought to know is confidential, and includes information that:
- (c) relates to the Contract, the Services, the Charges or the commercial arrangements between the parties; or
- (d) was provided or obtained prior to the date of the Contract.

**“Consumer”** has the same meaning as in section 3 of the Australian Consumer Law;

**“Consumer Guarantee”** means a Consumer Guarantee applicable to the Contract under the Australian Consumer Law;

**“Contract”** means these Terms, the Head Contract (if applicable), together with any Credit Application and Guarantee accepted by EC (as applicable);

**“Customer”** means the Customer identified as such on the Contract as well as the Person tendering the Goods for storage, transport and/or the provision of Services and any Associated Entity or third party who has a legal or beneficial interest in or right to the Goods;

**“Credit Application”** means the commercial credit application provided by EC to the Customer (if applicable);

**“Effective Control”** in relation to a corporation, means the ability to directly or indirectly control the composition of a majority of the board of directors of that corporation or

having more than 50% of the shares giving the right to vote at general meetings or securities conferring more than 50% of the rights to the income or capital of the corporation;

**Financing Statement** means a financing statement within the meaning of the PPS Act;

**Force Majeure** means any of the events set out below:

- (a) an act of God;
- (b) the outbreak of hostilities (whether or not accompanied by any formal declaration of war), riot, civil disturbance or acts of terrorism;
- (c) the act of any government or competent authority (including the cancellation or revocation of any approval, authority or permit);
- (d) fire, explosion, flood, inclement weather, or natural disaster;
- (e) the declaration of a state of emergency or the invocation of martial law having an effect on commerce generally;
- (f) industrial action (including strikes and lock-outs);
- (g) power failure;
- (h) motor vehicle accident;
- (i) the default of any suppliers under any material contracts;
- (j) the unexpected breakdown of refrigeration plant, machinery or escape of refrigerant despite regular preventative maintenance; or
- (k) any other cause, impediment or circumstance beyond the reasonable control of a party; and

which makes performance more onerous or uneconomic;

**Goods** mean the classes of goods identified in the Contract and any other goods accepted by EC from or for the Customer from time to time together with any containers, packaging or Storage Media supplied by or for the Customer;

**Guarantee** means a guarantee provided by the Guarantor in favour of EC in respect of a credit facility granted by EC to the Customer;

**Guarantor** means any Person who provides a Guarantee;

**Head Contract** means the EC Storage and/or Transport contract between EC and the Customer;

**Insured Risks** means the risks of loss or damage to the Goods whilst in Storage or transit caused by events including but not limited to fire, theft, storm damage, earthquake, lightning, explosion, malicious damage, flood, collision or overturning of the conveying vehicle and such other risks as may occur in the storage or transport of goods whether or not in the nature of the foregoing, as EC from time to time decides;

**Intellectual Property Rights** means all present and future intellectual and industrial property rights in the Goods conferred by law and wherever existing, including:

- (a) the EC Trade Identification;

- (b) patents, designs, copyright, rights in circuit layouts, know how, domain names, inventions, trade secrets and any other rights subsisting in the results of intellectual effort in any field, whether or not registered or capable of registration;

- (c) any application or right to apply for registration of any of these rights;

- (d) any registration of any of these rights or any registration of any application referred to in paragraph (c); and

- (e) all renewals and extensions of these rights;

**Interest Rate** means the rate determined by the National Australia Bank from time to time as being available generally to commercial borrowers for overdrafts in excess of \$100,000.00;

**Location** means the location described in the Contract;

**Personal Property Securities Register** means the register established under Section 147 of the PPS Act;

**PPS Act** means the *Personal Property Securities Act 2009 (Cth)*;

**Relevant Code of Practice** means the standard or regulation applying to the Contract (if any) identified in the Contract;

**EC** means Emergent Cold Pty. Ltd. ABN 14 059 512 159;

**EC Rates** means the rates set out in the Contract as EC may with or without notice determine in writing from time to time or as may be adjusted in accordance with the Rate Review formula contained in the Contract;

**EC IT Systems** means the EC computerised warehouse inventory and transport management systems including all data, reports, analysis and other aspects thereof whether in hard copy or machine readable form;

**EC Trade Identification** means the trade marks, service marks, symbols, branding, logos and other trade indicia (whether registered or not) owned or controlled by EC or any of its Related Bodies Corporate and used in connection with the business conducted by EC and its Related Bodies Corporate under the "Emergent Cold" name (or any name which replaces the "Emergent Cold" name);

**Security Agreement** means a security agreement within the meaning of the PPS Act;

**Security Interest** means a security interest within the meaning of the PPS Act;

**Services** means the services identified in the Contract and any other services that EC actually provides to the Customer;

**Storage** means the whole of the storage, packing and consolidation operations and other services undertaken by EC for the Goods as set out in the Contract but does not include collection of the Goods or their redelivery when taken out of store;

**Storage Media** means pallets, roll cages, cartons, crates, drums or other re-useable containers or packaging used for

the Storage or Transporting or provision of Services in respect of the Goods;

**"Sub-Contractor"** means any Person who is an, agent, employee or sub-contractor of EC with whom EC arranges Storage, Transport or Services in respect of the Goods;

**"Terms"** has the meaning given in Clause 1.1;

**"Transport"** means the transport services identified and agreed to be undertaken by EC for the Goods as set out in the Contract; and

**"Verification Statement"** means a verification statement within the meaning of the PPS Act.

## 18.2 Interpretation

In the Contract unless the context otherwise requires:

- (a) words importing the singular include the plural and vice versa;
- (b) references to any document (including the Contract) are references to that document as amended, consolidated, supplemented, novated or replaced from time to time;
- (c) headings are for convenience only and will be ignored in construing the Contract;
- (d) references to Parties or to a Party will be a reference to the parties or a party to the Contract and includes references to their or its respective successors, permitted assigns, executors and administrators;
- (e) references to law will include references to any constitutional provision, treaty, decree, convention, statute, act, regulation, rule, ordinance, subordinate legislation, rule of common law and of equity and judgment and shall include the requirements of any applicable stock exchange;
- (f) references to any law are references to that law as amended, consolidated, supplemented or replaced from time to time;
- (g) references to terms defined in the *Corporations Act 2001 (Cth)* will have the meanings given by that Act;
- (h) references to any Person include references to any individual, company, body corporate, association, partnership, firm, joint venture, trust and governmental agency;
- (i) references to personnel include references to any officer, employee, agent, contractor and subcontractor;
- (j) references to A\$ are to the lawful currency of Australia;
- (k) references to any costs and expenses incurred by EC include (without limitation) EC' internal costs and expenses;
- (l) prices and other payments which are expressed in a particular currency in the Contract are required to be made in that currency;
- (m) each of the obligations of the Parties contained in the Contract are separate and independent and

save as expressly provided are limited by reference to any other provision of the Contract;

- (n) no provision of the Contract will be construed adversely to a Party solely on the ground that the Party was responsible for the preparation of the Contract or that provision; and
- (o) all terms defined or quantified in:
  - (i) the Head Contract;
  - (ii) the Credit Application; and
  - (iii) the Guarantee,will be construed according to these Terms.

## 18.3 Inconsistency

In the event of any inconsistency between:

- (a) these Terms and any specific terms contained in the Head Contract, the specific terms contained in the Head Contract will prevail to the extent of that inconsistency; and
- (b) the Contract and any Relevant Code of Practice the Contract will prevail to the extent of that inconsistency.