

## STANDARD TERMS AND CONDITIONS OF SUPPLY

### 1 Application Of Terms And Conditions

- 1.1 *Application* - These terms and conditions of supply apply to and govern all supply orders placed with, and all contracts entered into by Edible Forest Fungi New Zealand (EFFNZ) whereby seedlings and trees infected with truffle or mushroom are supplied, provided and/or delivered by EFFNZ.
- 1.2 *Variations* - Any supply order may be varied only with EFFNZ's prior written consent and on the basis that the Customer fully indemnifies EFFNZ for any loss, damage, cost or expense which EFFNZ may suffer or incur as a consequence of its agreeing to such variation and all such variations shall be subject to these terms and conditions of supply.
- 1.3 *Conflict* - To the extent that any conflict exists between these terms and conditions of supply (or as they may be varied in accordance with this *clause 1*) and any other documentation or correspondence other than in any supply order, these terms and conditions of supply (or as they may be varied in accordance with this *clause 1*) shall be paramount and prevail.
- 1.4 *Binding on EFFNZ* - Any order or offer made by the Customer shall not be binding on EFFNZ until it has been duly signed as accepted on EFFNZ's behalf and a signed duplicate thereof delivered to the Customer and the deposit paid (if any).
- 1.5 *These terms prevail* - These terms and conditions of supply replace in their entirety any previous terms and conditions of supply published, issued or used by EFFNZ
- 1.6 *Fair Trading Act* - These terms and conditions of supply apply only insofar as they are consistent with the provisions of the Fair Trading Act 1986.

### 2 Payment

- 2.1 *Invoicing* - EFFNZ shall provide the Customer with invoices as follows:
  - (a) *Deposits* – A deposit as specified by EFFNZ shall be paid on receipt of the signed and accepted Supply Order form and an invoice will be issued for the amount specified.
  - (b) *Final Invoice* – EFFNZ shall provide the Customer with a final invoice, less the deposit previously paid, for the infected trees to the Customer's chosen delivery site.
- 2.2 *Time for Payment* - All invoices shall be due and payable on the 20<sup>th</sup> day of the month following the date of invoice.
- 2.3 *Default interest* - The Customer shall pay interest to EFFNZ on all moneys outstanding from the date 30 days after the date of invoice ("the interest date") calculated at monthly rests at the rate of the maximum per annum overdraft rate charged on EFFNZ's current account with EFFNZ's principal bank from time to time on the interest date plus 2%. Payments received by EFFNZ shall be credited first against any interest accrued.
- 2.4 *No set off* - The Customer shall not (nor shall it be entitled to) set off or deduct from any amount payable to EFFNZ under any agreement, any amounts payable by EFFNZ to the Customer under these terms and conditions of supply or any other agreement whatsoever.
- 2.5 *Non-payment* - Time for payment is of the essence of any supply order. If the Customer does not pay any amount when due, EFFNZ may, without prejudice to any of its other rights, treat such supply order as repudiated by the Customer or may, until the Customer makes payment in full, postpone or stop delivery of the seedlings and trees the subject of the supply order and any seedlings and trees the subject of any other contract with the Customer, without incurring any liability to the Customer. If EFFNZ hold any seedlings and trees under this *clause 2.5* they will be held for the Customer's account and at the Customer's risk. The Customer will reimburse EFFNZ for any costs incurred by EFFNZ in exercising the remedies under this *clause 2.5*.

2.6 *Immediate payment in some circumstances* - Notwithstanding any other provisions of these terms and conditions of supply, payment of the Customer's total indebtedness to EFFNZ shall become due and payable immediately upon the Customer (being a natural person) committing any act of bankruptcy or the Customer (being a company) committing any act which entitles any person to apply to issue a statutory demand, to apply to wind up the Customer or to appoint a receiver or a receiver and manager of the Customer or any of its assets, or an administrator of the Customer is appointed.

### 3 **Reservation Of Title**

3.1 *Reservation of Title* - Title to the seedlings and trees supplied by EFFNZ remains with EFFNZ as the sole and absolute property of EFFNZ as legal and equitable owner, and EFFNZ reserves the right to dispose of such seedlings and trees, until such time as the Customer's total indebtedness to EFFNZ is discharged.

3.2 *Mortgagee acknowledgement* - If the premises, or the land of which the premises forms part, on which the Customer holds seedlings and trees supplied by EFFNZ are or become at any time subject to any mortgage prior to title to such seedlings and trees passing to the Customer, then the Customer shall use its best endeavours to promptly obtain and provide to EFFNZ the mortgagee's written acknowledgement that title to the seedlings and trees remains with EFFNZ as the sole and absolute property of EFFNZ as legal and equitable owner, and EFFNZ reserves the right to dispose of such seedlings and trees, until such time as the Customer's total indebtedness to EFFNZ is discharged.

3.3 *EFFNZ's right to take control* - Until such time as the Customer's total indebtedness to EFFNZ is discharged or if any event as specified in *clause 11* occurs, EFFNZ may without notice and without prejudice to any of its other rights and remedies recover, take possession of, take control of, manage, cultivate, harvest and/or re-sell the seedlings and trees or any of them or any produce from them, and may enter upon the premises on which the Customer holds such seedlings and trees for any such purposes including inspection of seedlings and trees and the growing records. The Customer shall ensure that EFFNZ shall at all times have access to those premises, and hereby irrevocably authorises EFFNZ, its employees, licensees, agents and other authorised persons to enter upon those premises (and shall grant to EFFNZ or arrange for EFFNZ to be granted such rights of entry and control by way of lease or licence as and if necessary) or to exercise any other rights of entry for EFFNZ for such purposes.

3.4 *Fiduciary Relationship* - The Customer acknowledges that until its total indebtedness to EFFNZ is discharged it holds the seedlings and trees as bailee of EFFNZ and that a fiduciary relationship exists between them.

3.5 *Insurance* - The Customer warrants that until its total indebtedness to EFFNZ is discharged it will keep and maintain the seedlings and trees insured, and that such insurance policy is held in trust for, and any proceeds receivable by the Customer under such policy shall first be payable to, EFFNZ to the extent of the Customer's total indebtedness to EFFNZ.

3.6 *Other Limitations* - Prior to discharging its total indebtedness to EFFNZ, the Customer shall not without the consent of EFFNZ:

- (a) remove or uproot the seedlings and trees from the soil where they are located or otherwise damage or allow the seedlings and trees to be damaged in any way; or
- (b) charge, assign, sell, lease or part with possession of the seedlings and trees.

### 4 **Delivery**

4.1 *Address* - Unless otherwise agreed, where the Customer has nominated in writing an address to EFFNZ, EFFNZ shall deliver the seedlings and trees to such nominated address.

4.2 *Risk passes on delivery* - Subject to *clause 2.5* and notwithstanding that the title to the seedlings and trees may not have passed, the risk in the seedlings and trees shall pass to the Customer at the time of delivery.

- 4.3 *Delivery in instalments* - EFFNZ may supply the seedlings and trees in instalments and these terms and conditions of supply shall apply to each supply of seedlings and trees by instalments as if each instalment constituted supply under a separate agreement and, in particular, the Customer shall pay EFFNZ for each instalment of seedlings and trees so supplied irrespective of any failure or delay in the supply of any other instalment of seedlings and trees.
- 4.4 *Approximate Dates* - Any period or dates quoted for delivery are to be regarded as approximate only and EFFNZ will not accept any liability for any loss, damage or expenses consequent upon any delay in delivery of seedlings and trees.
- 4.5 *Delays* - EFFNZ shall use its best endeavours and take all reasonable steps to meet any date for supply of the seedlings and trees agreed between EFFNZ and the Customer. However:
- (a) where a delay in supply is caused by the Customer, including without limitation a variation requested by the Customer, EFFNZ may extend the time for supply by a period agreed between EFFNZ and the Customer or, failing such agreement, by a reasonable period; and
  - (b) where any substantial delay in supply is due to any other event or circumstance beyond the control of EFFNZ including without limitation strikes, lockouts or other labour disputes, riots, civil commotion, fire, flood, drought or plant or soil disease, then EFFNZ shall advise the Customer of such delay in writing. The Customer shall then and only then be entitled to cancel any order or to refuse to accept delivery and to receive a full refund of any deposit and any other monies paid but without interest.
- 4.6 Notwithstanding the above, in no event shall EFFNZ incur any liability or penalty or claim for damages for any loss of any kind due to any failure on its part to deliver the seedlings and trees by an agreed date.

## 5 **Cancellation**

If the Customer purports to cancel the supply order after acceptance at any time prior to delivery date then EFFNZ shall be entitled in its absolute discretion to retain the deposit paid under the supply order but without prejudice to its right to pursue any other remedies available to it for breach of contract.

## 6 **Preparation Of Soils**

EFFNZ agrees to supply plants only if the Customer's soils are properly prepared in accordance with EFFNZ specifications. In the event of the Customer's soils requiring modification, EFFNZ reserves the right to withhold supply of plants until the soil preparation meets EFFNZ specifications.

## 7 **Confidentiality**

### 7.1 *Definitions* – For the purposes of this clause:

“Confidential Information” means all information including Technical Information and commercial information relating to the Technology, and any other information relating to the business or affairs of a party which is disclosed by one party to the other party, which is stated by the party disclosing it to be confidential or which might reasonably be regarded by either of the parties as confidential;

“Technical Information” means drawings, specifications, processes, techniques, samples, specimens, prototypes, designs, research and development results, test results and other scientific information however produced and recorded relating to the husbandry and management of trees with mycorrhiza; and

“Technology” means the inoculation methodology necessary to establish a contamination free, viable, ectomycorrhizal association between edible truffles or mushrooms and the roots of suitable host trees, including oaks and hazels.

- 7.2 *Confidentiality* - Each party shall keep the other party's Confidential Information secret and confidential and, except to the extent permitted by the supply order, shall not disclose, publish or use any of it or permit or suffer any officer, employee, agent or consultant to disclose, publish or use any such Confidential Information.

7.3 *No reproduction* - Neither party shall reproduce or copy the other party's Confidential Information without that party's prior written consent other than for the purposes of exercising its rights under the supply order.

7.4 *Non-confidential information* - The obligations in this *clause 7* apply to Confidential Information but do not apply to information:

- (a) that the receiving party can establish by competent proof was already in its possession prior to its disclosure by the disclosing party;
- (b) that is in widespread use and was freely available to the public prior to the date of its disclosure to the receiving party;
- (c) that subsequently became widespread and freely available to the public except, directly or indirectly, by an unauthorised act or omission on the part of the recipient of the information or any officers, employees, agents or consultants of the recipient; or
- (d) that the receiving party receives without restriction from an independent third party that is lawfully entitled to disclose the information to the receiving party without infringing the rights of the disclosing party.

7.5 *Limited Disclosure* - Each party may only disclose the Confidential Information to:

- (a) those of its officers, employees, agents or contractors to whom disclosure is necessary to enable such party to perform its obligations under the supply order; and
- (b) its proposed or existing commercial collaborators including candidates for appointment as licensees,

provided that such disclosure is restricted to a need to know basis and subject to like confidentiality obligations as to disclosure as are contained in the supply order.

7.6 *Undertakings* - Each party must provide to the other party, upon the request of that party, a written undertaking for each officer, employee, agent, contractor or proposed or existing commercial collaborator to whom access or disclosure of Confidential Information is to be given or made pursuant to *clause 7.5*, that each person shall comply with the terms of this clause, modified as necessary as if references to a "party" were references to that person, before any such access or disclosure is given or made.

## 8 **Customer Acknowledgements**

The Customer acknowledges:

- (a) that EFFNZ in accepting any supply order does not in any way guarantee that truffles or mushrooms can be produced in New Zealand conditions or in commercial quantities;
- (b) that truffle and mushroom growing is a speculative and potentially high risk venture; and
- (c) that the Customer is entering upon truffle or mushroom growing solely in reliance upon the Customer's own judgment and not in reliance upon any representation, warranty, advice or information made or supplied by EFFNZ.

## 9 **Liability**

- 9.1 *Limitation of Liability* - EFFNZ shall use all reasonable efforts to carry out and perform its obligations under the supply order conscientiously and with professional care but it shall not be liable in any way (including liability in contract, tort, equity or any other basis) to the Customer or any third party (including but not limited to the Customer's employees, independent contractors and agents) for any loss, damage or claims whatsoever in respect of or arising directly or indirectly from or as a consequence of any act or omission on the part of EFFNZ under the supply order except where caused by the negligence of EFFNZ. Unless otherwise provided by statute, no condition or warranty to be performed or observed by EFFNZ is to be implied.
- 9.2 *Indemnity* - The Customer indemnifies and holds EFFNZ and its agents or servants harmless against any claim by a third party, any property damage consequential or contingent, or other loss, damage, or claim arising out of EFFNZ's performance of the supply order or arising out of the performance of the services or supply of seedlings and trees, except that for which EFFNZ is liable under *clause 9.1*.

## 10 **Dispute Resolution**

- 10.1 *Procedure* - Neither party shall commence any court or arbitration proceedings relating to a dispute arising out of this supply order including these terms and conditions of supply (including any dispute as to the validity, breach or termination of the supply order or as to any claim in tort, in equity or pursuant to any statute) unless that party has first complied with the following paragraphs of this clause.
- 10.2 *Notice* - Any party who claims that a dispute has arisen under or in relation to the supply order must give written notice to every other party specifying the nature of the dispute.
- 10.3 *Co-operation* - On receipt of such notice by the other parties, the parties to the supply order:
- (a) Must co-operate and use their best endeavours to resolve the dispute expeditiously; and
  - (b) Must, if they do not within seven days of the receipt of the notice (or such further period as they may agree in writing) resolve the dispute, refer the dispute to mediation ("the mediation").
- 10.4 *Mediation Terms* - The mediation shall in all respects be conducted in terms of the LEADR New Zealand Inc. Standard Mediation Agreement.
- 10.5 *Mediation Procedure* - The mediation shall be conducted by a mediator and at a fee agreed by the parties, failing agreement between the parties, the mediator shall be selected, and the mediator's fee shall be determined by, the Chair for the time being of LEADR New Zealand Incorporated.
- 10.6 *Interlocutory Relief* - A party who seeks urgent interlocutory relief may, by written notice to each other party to the dispute, elect not to comply with the provisions of *clauses 10.2 and 10.5*, but only to the extent of the relief sought and for the period required to dispose of the application for such interlocutory relief. Except to that extent, on the disposal of the application the provisions of *clauses 10.2 to 10.5* inclusive shall once again take effect.
- 10.7 *Arbitration* - Any dispute between the Parties which has not been settled by full and frank discussion under the mediation procedure may, after a Party gives thirty (30) days notice in writing to the other Party, be referred by the Party giving notice to arbitration, such arbitration to be conducted in accordance with the provisions of the Arbitration Act 1996 and the substantive law of New Zealand by an arbitrator appointed by the President for the time being of the New Zealand Law Society. Judgment on the award rendered may be entered in any court having jurisdiction.

## 11 **Termination**

- 11.1 *Circumstances* - EFFNZ may terminate the supply order without notice if the Customer:
- (a) is in breach of any term of the supply order including these terms and conditions of supply and fails to remedy the breach within 14 days of notice in writing by EFFNZ specifying the breach and requiring the Customer to remedy it;

- (b) subject to *clause 4.6(b)*, has failed or refused to take delivery of seedlings and trees the subject to the supply order and such failure or refusal continues for a period of 14 days after EFFNZ has notified the Customer that the seedlings and trees are ready for delivery or dispatch, as the case may be; or
- (c) is declared bankrupt, resolves to go into liquidation or has a petition for bankruptcy or the appointment of a liquidator presented against it or enters into a scheme of arrangement with its creditors or if any liquidator, provisional liquidator, administrator, receiver, receiver and manager or official manager is appointed in respect of the Customer or if anything analogous occurs in respect of the Customer.

11.2 *Compensation* - In the event of such termination EFFNZ shall, after taking into account payments made by the Customer to EFFNZ, be entitled to be paid by the Customer for work done and expenditure made under the supply order up to and including the date of termination and any direct and indirect loss suffered by EFFNZ included without limitation EFFNZ's loss of profit on the supply order and the legal costs of EFFNZ (on a full indemnity basis) incurred in relation to the termination and any prior breach and in exercising any rights and remedies as a consequence of the termination and any prior breach.

11.3 *Other rights and obligations* - Termination of the supply order shall:

- (a) be without prejudice to the rights of EFFNZ accruing up to the date of termination;
- (b) not release either party from obligations of confidentiality imposed and notwithstanding termination of the supply order obligations of confidentiality shall continue in full force and effect; and
- (c) not affect the ability of either party to recover from the other any liabilities required to be paid under the provisions of the supply order, or to meet past liabilities.

## 12 **Severance**

If any provision or part of any provision of these terms and conditions of supply is unenforceable, such unenforceability shall not affect any other part of such provision or any other provision of these terms and conditions of supply.

## 13 **Waiver**

Any waiver or purported or implied waiver by EFFNZ of strict compliance with these terms and conditions of supply shall not be deemed a waiver unless it is in writing and signed by an authorised officer of EFFNZ and shall not prejudice the rights of EFFNZ in respect of any breach of these terms and conditions of supply to which such waiver does not specifically relate.

## 14 **Not a Consumer Guarantee**

EFFNZ and the Customer agree that the goods and services provided to the client under this agreement are for the purpose of the Customer's business. They further agree that the Consumer Guarantees Act 1993 does not apply to this agreement.