



# **[Alere Ltd] [(Company Number 2137244)] (Alere) Terms of Trade**

## **1 Terms of Trade**

- a) These terms of trade constitute the entire understanding between Alere and the customer in respect of the sale of goods and override any conditions to the contrary which may be expressed in any of the customer's purchase order forms or other documents and supersede all prior arrangements between the parties whether written, oral or established through a course of dealings between Alere and the customer.
- b) These terms of trade cannot be varied except in writing signed by a duly authorised officer of Alere.

## **2 Sale and Purchase**

- a) By placing an order for goods with Alere, the customer is deemed to have accepted these terms of trade.
- b) Alere is under no obligation to supply any goods to any person in response to the placing of an order by that person.
- c) Alere is under no obligation to enquire as to the authority of any person placing an order on behalf of the customer.

## **3 Price**

- a) Alere may change its prices for goods at any time and without prior notice to customers. The price of the goods is as specified in Alere's price list, as amended by Alere in its absolute discretion from time to time, current as at the date the order is placed (the Price List).
- b) The Price List is in New Zealand dollars and all prices included in the Price List are exclusive of GST and any other taxes and duties which may be applicable, except to the extent such taxes or duties are expressly included in the Price List.



## 4 Payment

- a) Payment terms are payment by net cash 30 days from end of month in which the goods were supplied to the customer, by such method as Alere may nominate from time to time, unless otherwise agreed in writing and signed by a duly authorised officer of Alere.
- b) The customer must make payments to Alere and may not deduct or withhold any amount whether by way of set-off, counter claims, conditions, restrictions, withholdings or deductions, or be reason of any matter that may be in dispute between the customer and Alere, unless required by law or agreed to in writing and signed by a duly authorised officer of Alere.
- c) In the event of any default in payment by the customer, including but not limited to any reversal or stopping of payment, (and without prejudice to any other remedies Alere may have):
  - (i) the customer shall remain liable to make payment in full;
  - (ii) on demand by Alere, the customer will pay default interest for the period of non-payment equal to 3% above the basic rate charged by Alere's bankers on current overdraft facilities, such rate being calculated on the 20<sup>th</sup> of each month;
  - (iii) Alere may cancel any outstanding order with the customer or stipulate additional terms;
  - (iv) all amounts owing by the customer to Alere, whether due for payment or not, will immediately become due and payable; and
  - (v) all costs incurred in the recovery of an overdue amount (including collection costs and solicitors' fees) will be reimbursed by the customer and be recoverable in full by Alere from the customer.



## 5 Delivery

- a) Alere will use its best endeavours to deliver the goods on the agreed date for delivery or within the agreed period for delivery at the customer's warehouse or any other delivery point in New Zealand nominated by the customer upon at least seven days written notice. The customer acknowledges that the agreed date for delivery is a non-binding estimate only. Alere is not liable for any delay in delivery.
- b) Subject to clause 5(c), Alere will be responsible, at its own cost, for transportation of goods to the agreed destination advised by the customer and any other associated costs (including, but not limited to, storage and insurance of the goods) prior to delivery of such goods to the customer.
- c) Alere, may at its absolute discretion, charge the customer a freight levy based on the cost of transportation of goods and any other associated goods (including, but not limited to, storage and insurance of the goods). Alere will include details of any such freight levy charged in the relevant invoice provided to the customer.
- d) The customer will be responsible at its own cost for unloading the goods, or arranging for a suitable means of unloading the goods, from the relevant delivery vehicle. The customer shall also be responsible for all subsequent movements of the goods and pay all expenses and accept all risks in relation to the goods from the time they are available for unloading, including without limitation, storage charges.
- e) The customer must inspect the goods promptly upon delivery and must notify Alere in writing within five (5) business days of the date of delivery if the customer alleges that the goods are not in accordance with the order.
- f) If the customer fails to notify Alere in accordance with clause 5(e), the goods will be deemed to be in all respects in accordance with the order and the customer shall be bound to pay for the goods.



## 6 Risk and Title

- a) Subject to clause 5(e), risk of loss or damage to the goods passes to the customer when Alere delivers the goods in accordance with these terms of trade.
- b) Ownership of the goods remains vested in Alere until full payment for the goods has been made to Alere or title is properly vested in some other person by operation of law.
- c) To secure payments of all amounts owing to Alere in respect of the goods and the performance of all other obligations of the customer to Alere in respect of the goods, the customer acknowledges that these terms of trade create a purchase money security interest (as that term is defined in the PPSA) (PMSI) in respect of all Goods supplied to the customer.
- d) The customer acknowledges that it has or will receive value, as at the date of first delivery of the goods, under these terms of trade and that nothing in these terms of trade forms an agreement that a security interest created herein attaches at a later time than the time specified in section 40(1) of the PPSA, or an agreement to subordinate a security interest under these terms of trade in favour of any person.
- e) The customer will provide all information and do all things that Alere may require to ensure that Alere has a perfected security interest in respect of the goods under the PPSA.
- f) Until all amounts owing by the customer to Alere in respect of the Goods have been paid and all other obligations of the customer to Alere have been met, the customer:
  - (i) must hold the goods on trust as bailee;
  - (ii) must keep a full and complete record of the goods;
  - (iii) must return the goods if requested to do so by Alere following non-payment of any amount owing by the customer to Alere or non-fulfillment of any other obligation of the customer to Alere, without affecting any other rights Alere may have;
  - (iv) must give Alere the right to inspect the goods or any part of them at all reasonable times;
  - (v) must, to the maximum extent possible, keep the goods separate from other goods in the customer's possession;
  - (vi) must not change its name, address or contact details without providing Alere with at least 30 days prior written notice;
  - (vii) waives its right under the PPSA to:
    - (A) to receive a copy of a verification statement, following the registration by Alere of a financing statement or a financing change statement in the Personal Properties Securities Register;
    - (B) receive a copy of any financing statement or financing change statement;
    - (C) receive any notice that Alere intends to sell the goods or retain the goods on enforcement of the security interest (as defined in the PPSA) granted to Alere under these terms of trade;
    - (D) object to a proposal of Alere to retain the goods in satisfaction of any obligations owed by the customer to Alere; and
    - (E) receive a statement of account on sale of the goods.



- g) If title in the goods passes to the customer before full payment for the goods occurs and the customer sells the goods to a third party, the customer must hold the sale proceeds on trust for Alere.
- h) If the customer does not pay for the goods in accordance with clause 4 and title to the goods has not properly vested in some other person by operation of law, or the goods are at risk (as that term is defined in PPSA) Alere may (without prejudice to any other remedies available to Alere but subject to the Credit (Repossession) Act 1997), enter the premises where the goods are situated and re-take possession of the goods, and the customer hereby grants Alere an irrevocable license to enter such premises for the purpose of re-possessing the goods.

## 7 Return and Cancellation

- a) Subject to clause 8(c), Alere is under no obligation to accept goods returned by the customer. A restocking fee of 25% or \$200 (which ever is the lesser amount) will be charged for the returned product unless it is deemed the fault of Alere. Alere will accept returned goods only on terms to be agreed in writing in each individual case.
- b) Alere will, without any liability, and without any prejudice to any other right Alere has in law or equity, have the right by notice to suspend or cancel in whole or in part for the sale of goods to the customer if the customer fails to pay any money owing after the due date or commits any act of bankruptcy as defined in section 19 of the Insolvency Act 2006.
- c) No order may be cancelled except with consent in writing signed by a duly authorised officer of Alere, and upon such terms as Alere may specify.
- d) Any cancellation or suspension under clause 7(b) of these terms of trade will not affect Alere's claim for money due at the time of cancellation or suspension or for damages for any breach of any terms of these terms of trade or the customer's obligations under these terms of trade.
- e) Product Recall: Customer shall maintain appropriate up-to-date and accurate records to enable the immediate recall of any batches of the Products or any of them from the retail and/or wholesale markets, if the need arises because of any proceedings under the law or voluntarily by Alere. These records shall include records of deliveries to customers (including details of batch numbers, lot numbers, delivery date, name and address of customer, quantity, and telephone number and fax or telex number if available) and shall be held until at least 12 months after the expiry date of the product; any such recall shall be promptly implemented and administered by Customer in a manner which is appropriate and reasonable under the circumstances and in conformity with accepted trade practices and law.

## 8 Exclusion of Warranties

- a) Subject to clause 8(c), all conditions, warranties and terms not expressly contained in these terms of trade, whether implied by operation of statute, inference from circumstances, industry practice or otherwise, are excluded.
- b) The customer acknowledges that:
  - (i) it has not relied on any statement, representation, warranty, conduct or undertaking made or given by Alere or any person on its behalf; and
  - (ii) it has relied on its own skill and judgement in deciding to acquire the goods and in accepting these terms of trade.

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- c) Nothing contained in these terms of trade excludes, restricts or modifies any condition or warranty implied by applicable legislation which cannot be lawfully excluded, restricted or modified. Where Alere breaches such a condition or warranty, to the maximum extent permitted by law its sole and maximum aggregate liability for breach or for any and all claims under or relating to these terms of trade whether in contract , tort(including negligence ), in equality, under statute , under an indemnity , based on breach or any other basis is limited to the replacement of the goods or the supply of equivalent goods or payment of the cost of replacing the goods or acquiring equivalent goods, as determined by Alere.
  
- d) Any description of any goods supplied under these terms of trade is given solely for identifying the goods that are the subject of sale and does not constitute a sale by description. Alere hereby disclaims all other warranties, express or implied, including warranties of merchantability or fitness for a particular purpose. Alere expressly disclaims any representation and warranties regarding the performance, safety and efficacy of the products in combination with the compounds or any other products or component(s).



## 9 Limitation of Liability

- a) Where the customer is a consumer (as defined in the CGA) and:
  - (i) is acquiring or holding itself out as acquiring the Goods for a business purpose, the CGA will not apply;
  - (ii) subject to clause 9(a)(i), nothing in these terms affects any rights a consumer (as that term is defined in the CGA) may have under the CGA.
- b) The customer acknowledges that Alere does not provide any Express Guarantee (as that term is defined in the CGA), other than those expressly confirmed by Alere in writing.
- c) If the customer is acquiring the goods for the purposes of re-supplying them in trade, the customer:
  - (i) will include in its contract with its customers (On-Sale Customers) a clause to the effect that the CGA will not apply where an On-Sale Customer acquires or holds itself as acquiring the goods for business purposes;
  - (ii) will notify On-Sale Customers of the effect of clause 9(c)(i) at or before the time the goods are supplied to each On-Sale Customer that Alere does not undertake that repair facilities and spare parts for the goods will be available;
  - (iii) will not make any representations or give any guarantees or warranties to its On-Sale Customers relating to the Goods unless authorised in writing by Alere;
  - (iv) indemnifies Alere from and against any liability, damage, loss, cost or expense suffered or incurred as a direct or indirect result of the customer's failure to take the action required under this clause 9(c).
- d) Except as provided in clause 8(c), Alere excludes all liability arising out of or in connection with these terms of trade:
  - (i) for indirect, incidental, special, or consequential damages, loss of profits or savings (actual or anticipated), loss of goodwill or losses suffered by the customer or due to claims by third parties, whether or not Alere knew of the possibility of such damage or such damage was otherwise foreseeable; and
  - (ii) to the customer in negligence for acts or omissions of Alere including Alere's employees, agents and contractors.
- e) Nothing in these terms of trade is intended to have the effect of contracting out of the CGA, except to the extent permitted by law, and these terms of trade are to be modified to the extent necessary to give effect to that intention.



## 10 Force Majeure

- a) For the purposes of this clause Force Majeure means any of the following:
- (i) act of God;
  - (ii) law, rule, regulation or order of any government or governmental authority;
  - (iii) act of war declared or undeclared;
  - (iv) public disorder;
  - (v) riot, insurrection, rebellion, sabotage or act of terrorists;
  - (vi) flood, earthquake, hail, lightning, severe weather conditions or other natural calamity;
  - (vii) strike, boycott, lockout or other labour disturbance, which
    - (A) is beyond the control of Alere;
    - (B) could not have been reasonably foreseen by Alere; and
    - (C) was not directly or indirectly caused or contributed to by Alere.
- b) Delays in or failure of performance by Alere will not constitute a breach of these terms of trade by Alere if and to the extent any delay or failure is caused by a Force Majeure provided that Alere:
- (i) notifies the customer in writing within seven days of the occurrence of the Force Majeure providing details of the Force Majeure and its anticipated likely duration and effect; and
  - (ii) uses its best endeavours to resume fulfilling its obligations as promptly as possible and provides the customer with written notice within seven days of the cessation of the Force Majeure.
- c) If a delay caused by Force Majeure continues for more than fourteen (14) days, either party may terminate these terms of trade by giving seven (7) days notice to the other parties.



## 11 GST

- a) In this clause 11 words and expressions which are not defined in these terms of trade but which have a defined meaning in the GST Act have the same meaning given to those words and expressions in the GST Act.
- b) Unless otherwise expressly stated, all prices under these terms of trade are stated before GST (if any).
- c) If GST is payable by Alere in respect of any taxable supply made to the customer under these terms of trade, the customer will pay to Alere an amount equal to the GST payable on the supply.
- d) The customer will pay the amount referred to in clause 11(c) in addition to and at the same time that the consideration otherwise payable for the supply is to be paid under these terms of trade.
- e) Alere will deliver a tax invoice to the customer before the time for payment under clause 11(d).
- f) If any adjustment is required to the tax payable in respect of a taxable supply made by Alere under these terms of trade, the amount payable by the customer under clause 11(c) will be recalculated to reflect the adjustment made and a payment will be made by the customer to Alere or by Alere to the customer as the case requires.
- g) Where a party is required under these terms of trade to pay or reimburse an expense or outgoing of another party, the amount to be paid or reimbursed by the first party will be the sum of:
  - (i) the amount of the expense or outgoing less any input tax credits in respect of the expense or outgoing to which the other party is entitled; and
  - (ii) if the payment or reimbursement is subject to GST, an amount equal to that GST.



## 12 General

### 12.1 Defined Terms

In these terms of trade:

- a) "Business Day" means a day (other than Saturday or Sunday) on which registered banks are open for general banking business in Auckland, New Zealand;
- b) "CGA" means the Consumer Guarantees Act 1993;
- c) "Goods" means the professional medical diagnostic products supplied by Alere to the customer and includes without limitation all goods described in invoices issued by Alere to the customer;
- d) "GST" means goods and services tax imposed pursuant to the GST Act;
- e) "GST Act" means the New Zealand Goods and Services Tax Act 1985; and
- f) "PPSA" means the Personal Property Securities Act 1999.

### 12.2 Construction

Unless expressed to the contrary, in these terms of trade:

- a) words in the singular include the plural and vice versa;
- b) if a word or phrase is defined its other grammatical forms have corresponding meanings;
- c) "includes" means includes without limitation;
- d) no rule of construction will apply to a clause to the disadvantage of Alere merely because Alere put forward the clause or would otherwise benefit from it;
- e) a reference to:
  - ii. a person includes a partnership, joint venture, unincorporated association, corporation and a government or statutory body or authority;
  - (ii) a person includes the person's legal personal representatives, successors, assigns and persons substituted by novation;
  - (iii) any legislation includes subordinate legislation under it and includes that legislation and subordinate legislation as modified or replaced;
  - (iv) time is to local time in New Zealand; and
  - (v) "\$" or "dollars" is a reference to New Zealand currency.
- f) if the date on or by which any act must be done under this document is not a Business Day, the act must be done on or by the next Business Day; and
- g) where time is to be calculated by reference to a day or event, that day or the day of that event is excluded;
- h) any terms used but not defined in these terms of trade which are defined in the PPSA shall have the meaning given to those terms in the PPSA.



### 12.3 No Assignment

The customer must not transfer or assign any rights under this contract to anyone else without Alere's prior written consent.

### 12.4 Severability

If one or more of the provisions of these terms of trade is, or becomes illegal, invalid or unenforceable for any reason, the relevant provision is to be deemed to be modified to the extent necessary to remedy such unenforceability, illegality or invalidity or if this not possible then such provision must be severed from these terms of trade, without affecting the enforceability, legality or validity of any other provision of these terms of trade.

### 12.5 Waiver and Exercise of Rights

- a) A single or partial exercise or waiver by Alere of a right relating to this document does not prevent any other exercise of that right or the exercise of any other right.
- b) A party is not liable for any loss, cost or expense of any other party caused or contributed to by the waiver, exercise, attempted exercise, failure to exercise or delay in the exercise of a right.

### 12.6 Compliance

- a) Customers shall at all times conduct its business in full compliance with all applicable laws and regulations including any applicable anti-corruption laws or regulations. Alere reserves the right to immediately terminate supplies to the customer should the Customer make any payment which would violate the U.S. FCPA, or any other anti corruption laws. The Customer shall indemnify and hold Alere harmless, and hereby forever releases and discharges Alere, from and against all losses, liabilities, damages and expenses (including reasonable attorneys' fees and costs) resulting from the Customer's breach of this clause;
- b) The Customer is required to go through Alere's Anti-Corruption Policy and Code of Conduct available on [http://www.alere.com/content/dam/alere/docs/legal/Code\\_of\\_Conduct\\_April\\_2013.pdf](http://www.alere.com/content/dam/alere/docs/legal/Code_of_Conduct_April_2013.pdf) (together referred as Policy) , and agrees to abide by said Policy and, if required, it shall certify compliance with Policy from time to time.
- c) If goods are on-sold or distributed to a third party, the customer shall ensure that:
  - (i) the goods are handled appropriately and stored under the conditions stated on the product labelling;
  - (ii) the goods are within the expiration date stated on the product labelling at the time of supply;
  - (iii) the goods are not tampered with or broken down into individual components;
  - (iv) the goods are only supplied to an appropriate party, for example goods intended for professional use are only supplied to professionals and not general consumers;



- (v) distribution records are maintained for traceability purposes in respect to each unit sold including quantity sold, relevant lot or serial numbers and customer contact details; and
- (vi) there is an appropriate system for stopping shipments and removing products from distribution if required.

## **12.6 Open Source Software**

- a) The Alere-i instrument may contain or be delivered with certain open source software ("Open Source Software"). Your rights to use the Open Source Software are as set forth at [www.alere-i.com](http://www.alere-i.com)



## 12.7 Privacy

- a) Alere is committed to protecting the privacy of your personal information.
- b) In some cases, it may be necessary to request personal information in order to supply goods to a customer. If this information is not provided it may not be possible to provide goods.
- c) Our detailed privacy policy (<http://www.alere.com/au/en/privacy.html>) includes further information on:
  - (i) what personal information Alere collects;
  - (ii) how personal information is stored and used;
  - (iii) how you can access and seek correction of your personal information; and
  - (iv) how you can complain about a breach of your privacy and how we will deal with a complaint.
- d) By placing an order for goods with Alere, the customer is taken to have consented to providing any applicable personal information.

## 12.8 Governing Law and Jurisdiction

- a) These terms of trade are governed by and are to be construed in accordance with the laws applicable in New Zealand.
- b) Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Auckland, New Zealand and any courts which have jurisdiction to hear appeals from any of those courts and waives any right to object to any proceedings being brought in those courts.