

COMPETITION AND CONSUMER ACT 2010

Undertaking to the Australian Competition and Consumer Commission given under section 87B

by

Mitolo Group Pty Ltd (ACN 076 809 982) and Maranello Trading Pty Ltd (ACN 079 845 088)

1. Person giving the Undertaking

This Undertaking is given to the Australian Competition and Consumer Commission (ACCC) by Mitolo Group Pty Ltd (ACN 076 809 982) and Maranello Trading Pty Ltd (ACN 079 845 088) (Respondents) for the purposes of section 87B of the *Competition and Consumer Act 2010 (CCA)*.

2. Background

- 2.1 The Respondents are part of the Mitolo group of companies which carries on business as a potato producer and supplier to Australian retail and wholesale markets.
- 2.2 Between March 2017 and June 2018 in order to meet customer supply requirements, the Respondents supplemented production of potatoes at certain times of the year from supply by external growers.
- 2.3 The majority of those potatoes were subject to licence agreements with the owners of the intellectual property in the varieties under which the Respondents were only permitted to allow third parties access and use of the licensed varieties on certain conditions.
- 2.4 The Respondents entered into contracts with external growers for them to grow, and supply licensed varieties of commercial ware potatoes.

3. ACCC Investigation and Mitolo's response

- 3.1 Between April 2017 and June 2018:
 - 3.1.1 the ACCC requested copies of, and information concerning, small business standard form contracts that the Respondents had entered into with growers;
 - 3.1.2 the Respondents voluntarily produced copies of contracts and requested information;
 - 3.1.3 the ACCC asserted that a number of contract terms may be unfair terms in small business standard form contracts within the meaning of Part 2-3 of Chapter 2 of the Australian Consumer Law (ACL);
 - 3.1.4 the Respondents and the ACCC exchanged correspondence concerning the ACCC's assertions;
 - 3.1.5 the Respondents voluntarily made amendments to the terms of their template contracts;
 - 3.1.6 after reviewing the amendments to the template contracts, the ACCC continued to assert that a number of contract terms may be unfair terms in small business standard form contracts within the meaning of Part 2-3 of Chapter 2 of the ACL. The ACCC also raised

concerns that the amended template contracts may not have complied with clauses 18 and 32 of the Code.

4. Commencement of proceedings and ACCC's claims

4.1 On 25 June 2018 the ACCC commenced proceedings against the Respondents in the Federal Court of Australia in matter number VID 758 of 2018 (**Proceedings**).

4.2 In the Proceedings the ACCC alleged that:

4.2.1 certain contracts that the Respondents entered into with commercial ware potato growers:

(a) were standard form contracts within the meaning of section 27 of the *Australian Consumer Law (ACL)*;

(b) were small business contracts within the meaning of section 23 of the ACL; and

(c) contained certain unfair terms within the meaning of Part 2-3 of the ACL.

4.2.2 in relation to a number of growers, Mitolo had contravened clauses 12 and 32 of the Code.

5. Steps taken by the Respondents following commencement of Proceedings

5.1 Following commencement of the proceedings the Respondents:

5.1.1 jointly with the Applicant submitted consent orders at the first directions hearing providing for a mediation;

5.1.2 resolved the matter at the mediation with the Respondents making certain admissions in those proceedings; and

5.1.3 promptly sought further legal advice, and having regard to that legal advice, made further changes to their contracting practices and the terms of their template grower contracts to address each of the matters raised by the ACCC in the proceedings.

6. Resolution of the Proceedings

The ACCC and the Respondents have reached agreement on terms of settlement of the matters in dispute between them including the Proceedings, as part of which the Respondents have agreed to give and the ACCC has agreed to provide to the ACCC chair for acceptance this Undertaking and for consent orders to be entered in the Proceedings (**Consent Orders**).

7. Commencement of this Undertaking

7.1 This Undertaking comes into effect when the following have occurred (**Commencement Date**):

7.1.1 this Undertaking is executed by the Respondents; and

7.1.2 this Undertaking so executed is accepted by the ACCC.

B. Undertakings

The Respondents will not, for a period of 3 years from the Commencement Date whether by themselves, their servants or agents enter into, or offer to enter into, any standard form contract where the contract does not expressly specify a price for the supply under the contract which exceeds \$300,000, or where the contract has a duration of more than 12 months, \$1 million, with a grower of commercial ware potatoes for the supply of commercial ware potatoes on terms which are less favourable overall than those set out in Annexure "A" to this Undertaking.

Executed as an Undertaking

Executed by MITOLO GROUP PTY LTD (ACN 076 809 982) in accordance with section 127 of the Corporations Act 2001 (Cth)

Director (SOLE)

~~Director / Company Secretary~~

DARREN BRUNO MITOLO
Name (please print)

~~Name (please print)~~

Executed by MARANELLO TRADING PTY LTD (ACN 079 846 088) in accordance with section 127 of the Corporations Act 2001 (Cth):

Director (SOLE)

~~Director / Company Secretary~~

GIOVANNI RICCARDO MITOLO
Name (please print)

~~Name (please print)~~

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the Competition and Consumer Act 2010 (Cth) on:

Date 2 August 2019



Signed on behalf of the Commission:

Chair

2 August 2019

ANNEXURE A TO ENFORCEABLE UNDERTAKING

COMMERCIAL WARE POTATO GROWER AGREEMENT

COMMERCIAL WARE POTATO GROWER AGREEMENT

Date:

Mitolo Group Pty Ltd	Grower
Name: Mitolo Group Pty Ltd (Mitolo) ABN: 076 302 925 Address: 1304 Angle Vale Road, Virginia SA 5120 Attention: Ian Simpson Telephone: 08 8282 9000 Email: mailto:ian.simpson@mitologroup.com	Name: ABN: Address: Attention: Telephone: Email:

BACKGROUND

- A** Mitolo wishes to engage the Grower to produce and supply Commercial Ware Potatoes exclusively for Mitolo's use.
- B** Mitolo has agreed to sell to the Grower the Seed Potatoes required by the Grower to produce Commercial Ware Potatoes and the Grower has agreed to produce Commercial Ware Potatoes to be supplied to Mitolo on the terms and conditions contained in this agreement.
- C** The Grower has had an opportunity to obtain legal advice on the terms of the agreement between the Grower and Mitolo and to negotiate on the terms of the agreement.

The parties agree as follows:

1. DEFINITIONS AND INTERPRETATION

Defined terms and Interpretation rules are set out in clause 16 at the end of this agreement.

2. SUPPLY OF SEED POTATOES

- (a) Mitolo will supply the Grower with the volume of Seed Potatoes set out in Schedule 1 on the conditions set out below.
- (b) Except as permitted under this agreement the Grower:
- (i) must not sell, transfer or deliver any of the Seed Potatoes or any Propagation Material to any third party including its Related Entities;
 - (ii) must use the Seed Potatoes to produce Commercial Ware Potatoes in the Territory in accordance with the Season Plan;
 - (iii) must only produce Commercial Ware Potatoes on land owned and controlled by the Grower or its Related Entities;
 - (iv) must not produce any Propagation Material of the Specified Varieties; and
 - (v) must supply solely to Mitolo all Commercial Ware Potatoes produced from the Seed Potatoes.
- (c) The Grower must:
- (i) complete and return to Mitolo the dispatch/receival sheet which accompanies the delivery of Seed Potatoes within 2 Business Days. If the dispatch/receival sheet is not returned to Mitolo within 2 Business Days of the date of delivery of the Seed Potatoes the Grower will be deemed to have unconditionally accepted the quantity, sizing and quality of the Seed Potatoes;
 - (ii) supply to Mitolo the location of all fields planted with the Specified Varieties;
 - (iii) produce Commercial Ware Potatoes on a plot belonging to the Grower or a Related Entity to a high quality in accordance with best industry practice;
 - (iv) (without limiting clause 4) maintain accurate and comprehensive records in relation to the cultivation, production and harvesting of the Specified Varieties by the Grower;
 - (v) allow Mitolo and/or its officers, employees or agents the right and licence to enter at all reasonable times (on the provision of reasonable notice in the circumstances) the place where the Commercial Ware Potatoes and/or Seed Potatoes are planted by the Grower or held by the Grower to inspect, test and monitor the Commercial Ware Potatoes and/or Seed Potatoes. Mitolo will use reasonable endeavours not to disturb the business of the Grower during any such inspection;
 - (vi) notify Mitolo immediately of any problem or difficulty with the Commercial Ware Potatoes and/or Seed Potatoes including any disease or deterioration;
 - (vii) refrain from doing any act, matter or thing or make any statement that could reasonably be expected to adversely affect the commercial or professional reputation of the Specified Variety, Mitolo's business or name, or the Owner's business or name provided that nothing in this clause prevents the Grower from taking lawful and reasonable steps to enforce the Grower's contractual or other legal rights; and
 - (viii) comply with all relevant Federal, State and Territory laws, regulations and standards relating to the growing of Commercial Ware Potatoes.



3. DELIVERY OF COMMERCIAL WARE POTATOES

3.1 Supply of Commercial Ware Potatoes

Subject to clause 3.4 below the Grower must:

- (a) supply to Mitolo the volume of Commercial Ware Potatoes set out in the Season Plan;
- (b) supply the Commercial Ware Potatoes that meet the Specifications for each of the Specified Varieties;
- (c) deliver the Commercial Ware Potatoes to the destination specified by Mitolo, using a freight provider approved by Mitolo;
- (d) supply all Commercial Ware Potatoes in the Grower's possession (as well as all Farm Saved Seed and unused Seed Potatoes) as soon as is reasonably practical but in any case within any reasonable timeframe set by Mitolo, upon Mitolo's request for the Grower to do so; and
- (e) not supply Commercial Ware Potatoes (as well as all Farm Saved Seed and unused Seed Potatoes) to anyone other than Mitolo (or such other person as directed by Mitolo).

3.2 Rejection of Commercial Ware Potatoes

- (a) Mitolo may, within 48 hours of delivery of the Commercial Ware Potatoes, reject any consignment or any part of a consignment of Commercial Ware Potatoes that fail to meet the Specifications.
- (b) If Mitolo rejects Commercial Ware Potatoes under this clause, it will within 24 hours after the time at which the Commercial Ware Potatoes are rejected, notify the Grower of the rejection by telephone, fax, email or other electronic means and the reasons for the rejection in writing within 72 hours.
- (c) Unless otherwise agreed the Grower shall within 48 hours of receiving notification of the rejection (at its own cost) remove from the place of delivery any Commercial Ware Potatoes that Mitolo has rejected.
- (d) Mitolo may require the Grower to (without any entitlement to compensation and at its own cost) destroy any Commercial Ware Potatoes that fail to meet the Specifications, unless Mitolo and the Grower agree terms and conditions on which that the Grower will supply some or all of them to Mitolo or Mitolo has otherwise consented to supply to another party.
- (e) The Grower may by prior arrangement with Mitolo attend and observe any inspection of Commercial Ware Potatoes supplied by the Grower for the purpose of assessment of whether the potatoes meet the Specifications.
- (f) If Mitolo notifies the Grower that it has rejected Commercial Ware Potatoes under clause 3.2(b) above and the Grower does not agree that those potatoes failed to meet the Specifications the Grower may within 2 Business Days after receiving notification of the rejection give written notice of that disagreement to Mitolo in which event the following dispute resolution process shall apply (instead of and to the exclusion of any other dispute resolution procedure in this agreement):
 - (i) the parties must enter into good faith negotiations and use all reasonable endeavours to reach agreement;
 - (ii) If the parties cannot reach agreement within 5 Business Days (or such longer period as the parties agree), then:
 - (A) the dispute must be referred for resolution to a person (Expert) appointed by the Chief Executive

Officer of Potatoes South Australia Incorporated. The Expert will act as an expert, not as an arbitrator, in determining the dispute and the Expert's decision is final, conclusive and binding (except in the case of manifest error);

- (B) the parties must promptly supply the Expert with any information, assistance and co-operation requested in writing by the Expert in connection with its determination. All correspondence between the Expert and a party must be copied to the other party;
- (C) the Expert must be instructed to determine the dispute and provide it to the parties no later than 10 Business Days after the date he or she is appointed and must give each party an opportunity to make submissions;
- (D) each party must bear its own costs in complying with this clause 3.2(f) and the cost of a determination by the Expert must be borne in such manner as the Expert determines (having regard to the merits of the dispute).

3.3 Delivery of Commercial Ware Potatoes

Mitolo:

- (a) will take delivery of (and pay the purchase price in accordance with clause 5.2(a)(i) for) all Commercial Ware Potatoes that meet the Specifications and have been grown in accordance with the Season Plan, unless agreed otherwise between the parties or the Grower has elected to sell (and Mitolo has authorised the sale of) Commercial Ware Potatoes to a third party in accordance with clause 3.4(a) below;
- (b) is not required to take delivery of any Commercial Ware Potatoes that fail to meet the Specifications or have been grown outside of the parameters of the Season Plan;
- (c) will provide secure and suitable off-loading facilities so as to facilitate the safe and timely off-loading of the Commercial Ware Potatoes;
- (d) will give, or take reasonable steps to ensure that the Grower, is given a document evidencing receipt of the Commercial Ware Potatoes.

3.4 Release of Commercial Ware Potatoes

- (a) In the circumstances specified in Schedule 7 (where there is a failure to agree on price of Commercial Ware Potatoes which meet the Specifications and have been grown in accordance with the Season Plan) the Grower may elect to sell Commercial Ware Potatoes to a third party.
- (b) Mitolo may in its discretion (acting reasonably), authorise the release of Commercial Ware Potatoes that do not meet the Specifications or were grown outside the parameters of the Season Plan.
- (c) In each case Mitolo will authorise the release in accordance with Schedule 10 provided that (and the Grower warrants that) the sale will not be to another grower and will be for end use consumption by consumers.

4. REPORTING OBLIGATIONS

4.1 Reporting by Grower

The Grower must provide to Mitolo:



- (a) a report within 30 Business Days of planting the Specified Varieties advising:
 - (i) (the number of acres planted by the Grower in respect of each of the Specified Varieties; and
 - (ii) in respect of each pivot planted, the:
 - i. date of planting;
 - ii. Specified Variety planted;
 - iii. Volume of Seed Potatoes planted;
 - iv. Seed Potato grower; and
 - v. proposed date of harvest;
- (b) a report within 30 Business Days of harvesting of the Specified Varieties advising in respect of each area harvested by the Grower the:
 - (i) date of harvesting;
 - (ii) Specified Variety harvested;
 - (iii) volume of Commercial Ware Potatoes harvested; and
 - (iv) the use of any chemicals, dressings and additives used on the Specified Varieties;
- (c) an annual report to Mitolo by 31 July of each year for the 12-month period 1 July to 30 June. The report must reconcile the Information from clause 4.1(a) and clause 4.1(b) to details of Commercial Ware Potatoes produced and any volume retained for use as Farm Saved Seed in a subsequent season (as agreed with Mitolo under clause 6 below);
- (d) copies of compliance certification with the Food Quality Standards (including MRL Results) prior to delivery of Commercial Ware Potatoes.

4.2 Reporting By Mitolo

- (a) For each Reporting Period Mitolo will give the Grower a statement for the Reporting Period, for the Grower's Commercial Ware Potatoes received by Mitolo during the Reporting Period and specifying the matters prescribed by the Code.
- (b) Mitolo will give the statement referred to in clause 4.2(a) to the Grower within 30 days following the end of the Reporting Period.

5. PRICING AND PAYMENT

5.1 Payment for Seed Potatoes

The Grower will pay Mitolo the purchase price for the Seed Potatoes within 45 days of the date of delivery of the Seed Potato (or such later date as is agreed to by Mitolo), calculated in accordance with the Supply List as set out in Schedule 6 or as otherwise agreed to between the parties in writing.

5.2 Payment for Commercial Ware Potatoes

Mitolo will, subject to clause 5.3(a) and 5.4, in accordance with Mitolo's standard terms and conditions set out in Schedule 8, pay the Grower:

- (a) the purchase price determined in accordance with Schedule 7 for all delivered Commercial Ware Potatoes which meet the Specifications and which are produced in accordance with the Season Plan;

NOTE: The estimated total contract price for Commercial Ware Potatoes to be supplied in accordance with this clause is set out in Schedule 9;
- (b) any purchase price as may be agreed in writing by the parties for any Commercial Ware Potatoes which fail to meet the Specifications or which are produced outside of the parameters of the Season Plan upon the delivery of those Commercial Ware Potatoes.

5.3 Commercial Royalty

- (a) Mitolo will deduct from any payment due from Mitolo to the Grower, the Commercial Royalty in respect of all Commercial Ware Potatoes sold by the Grower.
- (b) Where Mitolo authorises the Grower to sell Commercial Ware Potatoes to a third party, the Grower must provide Mitolo with a report within 10 Business Days of the sale of the Commercial Ware Potatoes to a third party, detailing the volume of Commercial Ware Potatoes of each of the Specified Varieties sold and to whom they were sold.
- (c) The Grower must keep accurate records and accounts, in accordance with good accounting practice, recording the matters specified in clause 5.3(b). The Grower will provide Mitolo with copies of the records and accounts if requested.

5.4 Authority to Deduct

The Grower authorises Mitolo to deduct any money owed by the Grower to Mitolo from any payment due to the Grower by Mitolo in respect of the Commercial Ware Potatoes.

6. FARMED SAVED SEED

- (a) The Grower may not retain Seed Potatoes, Commercial Ware Potatoes or any part of them for use as Propagation Material in a subsequent season ("Farm Saved Seed") without Mitolo's prior written consent.
- (b) In the event that Mitolo authorises the Grower to retain Farm Saved Seed the Grower shall:
 - (i) complete and return to Mitolo the Farm Saved Seed declaration set out in Schedule 2;
 - (ii) complete and return to Mitolo the Farm Saved Seed Declaration set out in Schedule 3 in respect of all Farm Saved Seed planted in a subsequent season; and
 - (iii) pay to Mitolo a fee (Farm Saved Seed Fee) on the date of planting of the Farm Saved Seed in the subsequent season (as specified in Schedule 1 to this agreement).
- (c) Any unused Seed Potatoes, or unsold Commercial Ware Potatoes not authorised to be retained as Farm Saved Seed shall be destroyed at the end of each season at the Grower's cost.

7. INTELLECTUAL PROPERTY AND PLANT BREEDERS RIGHTS

7.1 Acknowledgment of Owner's Rights

The Grower acknowledges that the Owner owns the intellectual property associated with the Specified Varieties and anything relating to that intellectual property, including without limitation any intellectual property contained within any mutations, developments or any other improvements of the Specified Varieties (and the Grower will immediately inform Mitolo of such mutations, developments or any other improvements). The Grower will sign any document or do anything reasonably required by Mitolo to vest or confirm the Owner's intellectual property ownership rights.

7.2 Plant Breeders Rights

- (a) The Grower acknowledges the Owner's intellectual property rights in and to the Specified Varieties (which may include Plant Breeder Rights) and agrees it will not (and must ensure that its Related Entities do not) seek to exploit the intellectual property rights of the Owner except in accordance with this agreement.



- (b) The Grower acknowledges that the Owner and/or Mitolo (if Mitolo doesn't own the Specified Variety) may use or permit any other person to grow or cultivate the Specified Varieties in, or outside, the Territory. Mitolo may sell or otherwise transfer Seed Potatoes to other persons on any conditions as Mitolo deems appropriate.
- (c) If the Grower becomes aware of the infringement of any Plant Breeding Rights by another grower with respect to the Specified Varieties, then the Grower must immediately inform Mitolo.
- (d) The Grower agrees to do all things reasonably necessary to aid and cooperate with the Owner and/or Mitolo (at all times on the basis that Mitolo will meet all reasonable costs incurred by the Grower) in any action which they may adopt to maintain or protect their intellectual property rights.

8. EXPORTS

The Grower must not export Commercial Ware Potatoes or other Propagating Material of the Specified Varieties without Mitolo's prior written consent.

9. INDEMNITY

- (a) The Grower indemnifies Mitolo against any Claims made or commenced against Mitolo and any Loss, damage or expense (including legal costs on a full indemnity basis) which Mitolo suffers or incurs, as a result of the Grower breaching this agreement.
- (b) Mitolo indemnifies the Grower against any Claims made or commenced against the Grower, and any Loss, damage or expense (including legal costs on a full indemnity basis) which the Grower suffers or incurs, as a result of Mitolo breaching this agreement.

10. INSURANCE

Mitolo has insurance for Commercial Ware Potatoes under Mitolo's control, the details of insurance policy are as follows:

- (a) the insurance policy is with Zurich Australia Insurance Ltd;
- (b) the maximum amount of insurance cover provided by the policy in respect of claims that may be made in relation to the Commercial Ware Potatoes is \$160 million combined Industrial special risks;
- (c) the policy covers Damage, being physical loss, damage or destruction.

11. DISPUTE RESOLUTION

11.1 Dispute Contact

The contact details of the person to contact for each of the parties in the event of a dispute under this agreement or the Code are set out on the front page of this agreement.

11.2 Dispute Resolution Process

- (a) If there is a dispute in relation to this agreement about a matter which is not covered by another dispute determination process under this agreement then the matter must be determined in the following way.
- (b) The parties must enter into good faith negotiations and use all reasonable endeavours to resolve any matters in dispute.
- (c) If the parties cannot agree on a resolution of the dispute within 10 Business Days either party may request that

the matter be referred to an expert (Expert) for determination.

- (d) If the parties are unable to agree on the identity of an Expert within 10 Business Days of the request the Expert shall be an appropriately qualified and non-conflicted person nominated by the Institute of Arbitrators and Mediators Australia with an instruction that the Expert make a decision on the matter or matters in dispute within 10 Business Days.
- (e) The Expert:
 - (i) subject to the following has an absolute discretion to determine the procedures for determination of the dispute;
 - (ii) must give each party an opportunity to present argument in support of their view on the matter or matters in dispute as well as an opportunity to consider and formally respond to the arguments of the other party; and
 - (iii) is appointed as an expert and not as an arbitrator.
- (f) The Expert's written determination is final and binding for the purposes of this agreement in the absence of manifest error.
- (g) Each party must bear its own costs in complying with this clause and the cost of a determination by the Expert must be borne in such manner as the Expert determines (having regard to the merits of the dispute).

12. TERM AND TERMINATION

12.1 Term

- (a) The Term of this agreement commences on the earlier of:
 - (i) the date of this agreement;
 - (ii) the date on which the Grower receives Seed Potatoes from Mitolo; and
 - (iii) any other date agreed by the parties.
- (b) The Term of this agreement, unless otherwise extended by agreement between the parties in writing, ends on the earlier of the following:
 - (i) All Commercial Ware Potatoes produced from the Seed Potatoes supplied by Mitolo or Farm Saved Seed retained by the Grower are either delivered to Mitolo or otherwise destroyed;
 - (ii) All Seed Potatoes supplied by Mitolo or Farm Saved Seed retained by the Grower are either used, returned to Mitolo or otherwise destroyed;
 - (iii) The agreement is terminated by written notice given under clause 12.2 or 12.3; and
 - (iv) 12 months from the date the Term commences

12.2 Cooling off

Either party may terminate this agreement by written notice to the other within 7 days after the date on which this agreement is entered into.

12.3 Termination Rights

Either party may terminate this agreement immediately by written notice to the other party if the other party:

- (a) breaches a material term of this agreement which is capable of remedy, and does not remedy that breach within 14 days of being requested in writing to do so;
- (b) breaches a material provision of this agreement where that breach is not capable of remedy;
- (c) ceases to carry on business; or
- (d) suffers an Insolvency Event (except to the extent that any legislation affects the right of a party to terminate this agreement on those grounds).



12.4 Effect of Termination

In the event of termination of this agreement, or expiry of this agreement the Grower will:

- (a) At Mitolo's direction, either return to Mitolo or destroy any unused Seed Potatoes, Farm Saved Seed and unsold Commercial Ware Potatoes. If the Grower fails to do so Mitolo may enter upon the location where the Seed Potatoes, Farm Saved Seed or Commercial Ware Potatoes are located and remove or destroy them (and Mitolo will use reasonable endeavours not to disturb the Grower's business if it so enters the location);
- (b) not retain any part of the Seed Potatoes, Farm Saved Seed or Commercial Ware Potatoes;
- (c) grow out any crop of Commercial Ware Potatoes that have already been planted and deliver all Commercial Ware Potatoes that meet Specification and have been grown in accordance with the Season Plan to Mitolo on the terms and conditions that would have applied had this agreement not been terminated; and
- (d) deal with any Commercial Ware Potatoes that fail to meet Specification or have been grown outside of the parameters of the Season Plan based on the terms and conditions that would have applied had this agreement not been terminated.

13. FORCE MAJEURE

- (a) Neither party is liable for any Loss suffered by the other party where a Force Majeure Event prevents them from performing their obligations under this agreement.
- (b) Each party must notify the other party as soon as practicable of any anticipated delay due to Force Majeure Event and the performance of the affected party's obligations under this agreement will be suspended for the period of the delay due to Force Majeure Event.
- (c) If a delay due to Force Majeure Event exceeds 30 days, either party may terminate this agreement immediately on providing notice to the other.

14. BENEFITS HELD

Mitolo holds the benefit of each indemnity, promise and obligation in this agreement that benefits it, any of its Related Entities or their respective officers and employees, on its own behalf and as agent for each of those persons.

15. GENERAL

15.1 Assignment

- (a) Mitolo may assign this agreement without the consent of the Grower to a Related Entity or a successor to all or substantially all of its business, assets and obligations.
- (b) This agreement is personal to the Grower listed in the Details section at the beginning of this agreement. The Grower cannot assign, transfer, sub-licence or deal in any way with this agreement without Mitolo's prior written consent (which consent will not be unreasonably withheld). A material change in the Grower's shareholding is an assignment for the purposes of this clause.
- (c) The Grower may not without the prior written consent of Mitolo (which consent will not be unreasonably withheld) part with ownership, possession or management of the location at which the Specified Varieties are planted unless:

- (i) the Grower advises Mitolo of the proposed change of ownership, possession or management; and
 - (ii) the prospective purchaser, lessee, or manager agrees to a novation of this agreement to it on terms acceptable to Mitolo, Mitolo acting reasonably.
- (d) In circumstances where the grower is growing Specified Varieties on land owned by a Related Entity, the Grower must procure that the Related Entity does not without the prior written consent of Mitolo (which consent will not be unreasonably withheld) part with ownership, possession or management of the location at which the Specified Varieties are planted unless:
 - (i) the Grower advises Mitolo of the proposed change of ownership, possession or management; and
 - (ii) the prospective purchaser, lessee, or manager agrees to a novation of this agreement to it on terms acceptable to Mitolo, Mitolo acting reasonably.

15.2 Variation

This agreement cannot be amended, modified, varied or supplemented except in writing signed by a duly authorised representative of the parties.

15.3 Horticulture produce agreement

Mitolo acknowledges (without admission) that this agreement may be construed, for the purpose of the Code, as a horticulture produce agreement under which Mitolo is trading as a merchant.

15.4 Relationship

Nothing in this agreement creates or is deemed to create a partnership, a joint venture or a relationship of employer and employee between the parties. No party may act or hold itself out as the agent or representative of the other party or assume or create any legal obligations on behalf of the other party.

15.5 Confidentiality

Each party will keep confidential and not disclose to any third party this agreement, all records and information relating to the Specified Varieties (including relating to cultivation, production, harvesting, distribution, costs, volumes and selling prices), except to the extent:

- (a) the other party consents in writing to its disclosure;
- (b) such information lawfully enters the public domain;
- (c) the disclosure is to a party's advisor who is providing advice in relation to the agreement;
- (d) the disclosure is part of an overall due diligence process in relation to a party and the disclosure is to a person who has signed a confidentiality agreement undertaking to protect the confidentiality of the information; or
- (e) either party is required to disclose such information under any applicable governmental regulation or law that may be applicable in the Territory; or
- (f) for the purpose of any audit or satisfying the requirements of any applicable food safety or quality scheme including audit and accreditation under any such scheme.

In the case of (c), (d), (e) and (f) above information shall only be provided on a "need to know basis".

15.6 No waiver

No failure or delay of either party to enforce any of the provisions of this agreement shall constitute a waiver of any rights to future enforcement.



15.7 Survival of provisions

The provisions of this agreement relating to Ownership, Farm Saved Seed, Confidentiality, Termination, Indemnity and Governing Law shall not expire when this agreement ends.

15.8 Governing law

This agreement is governed by the laws of South Australia and the parties submit to the non-exclusive jurisdiction of the court of South Australia.

15.9 Notices

Any notice or other communication, including but not limited to, any request, demand, consent or approval to or by a party shall be sent to the addresses listed in the parties section at the beginning of this agreement, and will be deemed to be delivered:

- (a) if emailed, on that same Business Day if sent by 5pm;
- (b) if posted by registered post, 10 days from date of postage; or
- (c) if by facsimile, the next business day in the country of the addressee, following confirmation of transmission to the addressee's facsimile number.

15.10 Entire agreement

This agreement represents the entire agreement and understanding between the parties relating to the matters set out herein and supersedes any prior written or oral agreements about the Specified Varieties during the Term.

15.11 GST

If GST is payable by a supplier on a supply made under this agreement, then, to the extent that:

- (a) the consideration is expressed as an amount of money (the monetary consideration) for that supply and is not stated to include an amount in respect of GST; or
- (b) the amount of GST stated to be included in the monetary consideration is less than the amount of the GST liability actually incurred by the supplier in respect of that supply, the supplier may increase the monetary consideration by the applicable amount of GST and the recipient must pay that increased amount at the same time and to the same extent as any part of the monetary consideration that is payable to the supplier in respect of that supply.

15.12 Further assurance

Each party must at its own cost promptly do whatever any other party reasonably requires of it to give effect to this agreement and to perform its obligations under it.

15.13 Remedies cumulative

Unless otherwise provided in this agreement, the rights and remedies provided in this agreement are in addition to other rights and remedies given by law or equity independently of this agreement.

15.14 No merger

Any right or obligation of any party that is expressed to operate or have effect on or after the completion, expiration or termination of this agreement for any reason, will not merge on the occurrence of that event but will remain in full force and effect.

15.15 Counterparts

This agreement may be executed in any number of counterparts, including delivery by way of facsimile or electronic transmission. All counterparts taken together

constitute one instrument.

15.16 Severability of provisions

Any provision of this agreement that is prohibited or unenforceable in any jurisdiction is ineffective as to that jurisdiction to the extent of the prohibition or unenforceability. That does not invalidate the remaining provisions of this agreement nor affect the validity or enforceability of that provision in any other jurisdiction.

16. DEFINITIONS

In this agreement:

Business Days means any day that is not a Saturday, Sunday, gazetted public holiday or bank holiday in Adelaide, South Australia and concludes at 5 pm on that day.

Claim means any allegation, debt, cause of action, liability, claim, proceeding, suit or demand of any nature howsoever arising and whether present or future, fixed or unascertained, actual or contingent whether at law, in equity, under statute or otherwise.

Code means the Horticulture Code of Conduct prescribed by the *Competition and Consumer (Industry Codes—Horticulture) Regulations 2017*, as amended from time to time, to the extent that it applies to this agreement.

Commercial Royalty means the commercial royalty as set out in Schedule 1, payable by the Grower to Mitolo for access to the Specified Varieties.

Commercial Ware Potatoes means end use consumption potatoes of the Specified Varieties produced for sale into consumer distribution channels.

Food Quality Standards means the HARPS Tier 3 "approved base scheme" (BRG, Freshcare, Global GAP SQF).

Force Majeure Event means any strikes, lockouts, bans or other industrial disturbances (except those limited to the Growers property or premises), acts of the enemy, wars or conditions arising out of or attributable to wars, whether declared or undeclared, blockades, insurrections, riots, epidemics, landslides, earthquakes, explosions or other events of a similar kind to the preceding events, and including general agricultural production risks such as drought, floods, crop fires and similar events.

GST has the meaning given in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Insolvency Event means the happening of any one or more of the following events:

- (a) a corporation is unable to pay all its debts as and when they become due and payable or has failed to comply with a valid demand, whether a statutory demand as provided in section 459F (1) of the Corporations Act or otherwise;
- (b) a meeting of directors or governing body of a corporation is convened for purposes which include considering a resolution that the party become an externally administered body (as that phrase is defined in the Corporations Act) or the corporation is otherwise placed under external administration;
- (c) an application is made to a court for a corporation to be wound up and the application is not formally objected to within one month or formally dismissed within one month;
- (d) the appointment of a controller (as defined in the Corporations Act) of any assets of a corporation;



- (e) a corporation proposes to enter into or enters into any form of arrangement (formal or informal) with its creditors or any of them, including a deed of company arrangement; or
- (f) a corporation becomes insolvent under administration, as defined in the Corporations Act; or
- (g) In respect of an individual:
 - (i) the person has a bankruptcy notice issued against the person;
 - (ii) a receiver or a trustee for creditors or in bankruptcy is appointed to any of the person's property;
 - (iii) a garnishee notice is given concerning any money that the person is said to be owed;
 - (iv) the person proposes or enters into an arrangement or composition with, or an assignment for the benefit of, any of the person's creditors;
 - (v) the person proposes or effects a moratorium involving any of the person's creditors;
 - (vi) the person stops or suspends, or threatens to stop or suspend, the payment of all or a class of its debts or the conduct of all or a substantial part of its business;
 - (vii) the person is unable to pay all of the person's debts as they fall due or is presumed to be insolvent under any applicable law;
 - (viii) the person becomes an "insolvent under administration" as defined in section 9 of the Corporations Act;
 - (ix) anything having a substantially similar effect to any of the events specified in paragraphs (i) to (viii) inclusive of this definition happens to the person under the law of any jurisdiction; or
 - (x) the person dies, is imprisoned or becomes incapable of managing his or her own affairs.

Loss means all losses including liabilities, damages, costs and expenses (including legal fees on an indemnity basis and disbursements and costs of investigation, litigation, settlement, judgment, interest, fines and penalties).

MRL Results means results containing Maximum Residual Limit "C6", Supermarket Screening; Microbial Results E.coli, Salmonella; Heavy Metals, Lead and Cadmium.

Owner means the legal title holder of the intellectual property rights in the Specified Varieties in the Territory.

Plant Breeder's Rights means, in relation to Australia, plant breeder's rights as described in the Plant Breeder's Rights Act 1994 (Cth), or in relation to any other country, the equivalent plant breeder's rights as described in the relevant legislation of that country.

Propagation Material means in relation to a Specified Variety, any part or product from which, whether alone or in combination with other parts or products of that plant, another plant with the same essential characteristics can be produced and for the avoidance of doubt includes Farm Saved Seed whether harvested or un-harvested and whether physically under the control of the Grower or Mitolo.

Related Entity has the meaning given in the *Corporations Act 2001* (Cth).

Reporting Period means quarterly.

Season Plan means the forecast production and supply plan for the growing season covered by this agreement attached as Schedule 4 and as amended by agreement in writing from time to time.

Seed Potatoes means seed potatoes of the Specified Varieties provided to the Grower by Mitolo.

Specifications means the specifications for the

Commercial Ware Potatoes of each of the Specified Varieties as prescribed by Mitolo from time to time including without limitation to the specifications attached in Schedule 5.

Specified Varieties means the potato varieties listed in Schedule 1.

Term has the meaning set out in clause 12.1.

Territory means Australia.

Executed as an agreement on

Executed by Mitolo by its duly authorised signatory:

Signature of authorised signatory

Name of authorised signatory

Executed by the Grower by its duly authorised signatory:

Signature of authorised signatory

Name of authorised signatory



SCHEDULE 1 - SPECIFIED VARIETIES

Variety	Owner	Commercial Royalty payable per tonne of Commercial Ware Potatoes sold by the Grower	Volume of Seed Potatoes to be supplied	Farm Saved Seed	
				Tonnes	Fee



SCHEDULE 2 – FARM SAVED SEED DECLARATION

DATE: [Insert date of declaration]

TO: Mitolo Group Pty Limited
Cnr Angle Vale Road and Johns Road, Virginia, SA 5120

Attention: Ian Simpson
Email: ian.simpson@mitologroup.com
Facsimile: (08) 8282 9000

Grower
[Insert name of Grower]

Reporting Period:

Variety	Date Harvested	Tonnes

Location
[Insert location where Farm Saved Seed will be kept]

We declare that:

- (a) the information provided above is an accurate record of the Farm Saved Seed retained by us in accordance with the Commercial Ware Potato Grower Agreement between us and Mitolo Group Pty Limited trading as Mitolo Group;
- (b) the Location above is the location where the Farm Saved Seed will be kept.

Executed by The Grower by its duly authorised signatory:

Signature of authorised signatory

Name of authorised signatory



SCHEDULE 3: DECLARATION AS TO PLANTING OF FARM SAVED SEED

DATE: [Insert date of declaration]

TO: Mitolo Group Pty Limited
Cnr Angle Vale Road and Johns Road, Virginia, SA 5120

Attention: Ian Simpson
Email: ian.simpson@mitologroup.com
Facsimile: (08) 8282 9000

Grower
[Insert name of Grower]

Reporting Period:

Variety	Date Planted	Tonnes Planted	Area Planted

Location
[Insert location where Farm Saved Seed Planted]

We declare that:

- (a) the Information provided above is an accurate record of the area planted with Farm Saved Seed in accordance with the Commercial Ware Potato Grower Agreement between us and Mitolo Group Pty Limited trading as Mitolo Group;
- (b) the Location above is the location where the Seed Potatoes will be grown.

Executed by The Grower by its duly authorised signatory:

Signature of authorised signatory

Name of authorised signatory



SCHEDULE 4: SEASON PLAN



SCHEDULE 5 – SPECIFICATIONS



SCHEDULE 6 – SEED POTATO SUPPLY LIST

Variety	Seed size	Purchase Price per tonne

NOTE: The above is subject to change having regard to the availability of seed varieties.

SCHEDULE 7 – PURCHASE PRICE DETERMINATION

1. The purchase price for supply under this agreement will be:
 - 1.1 a price per tonne as agreed in writing prior to delivery. Mitolo will provide written confirmation of the price to the Grower at least 21 days prior to scheduled delivery; or
 - 1.2 if a price has not already been agreed Mitolo will provide written nomination of the price to the Grower at least 21 days prior to scheduled delivery. The price nominated by Mitolo will be the purchase price for the supply unless the Grower gives written notice to Mitolo under clause 2 or 3 below.
2. At any time before delivery of the produce the Grower may give notice in writing to Mitolo that it does not agree with the price nominated by Mitolo under clause 1.2. If so (subject to clause 3 below) the price will be determined by the following method:
 - 2.1 The parties must enter into good faith negotiations and use all reasonable endeavours to agree the price for the supply;
 - 2.2 If the parties cannot agree the price within 5 Business Days after delivery (or such longer period as the parties agree), then:
 - 2.2.1 the determination of the price must be referred for resolution to an Expert (Expert);
 - 2.2.2 if the parties do not agree on the identity of an Expert within 5 Business Days after delivery the Expert shall be a person appointed by the chief executive officer of Potatoes South Australia Incorporated. The Expert will act as an Expert, not as an arbitrator, in determining the price and the Expert's decision is final, conclusive and binding (except in the case of manifest error). The Expert shall determine the price in an amount that the Expert considers is a fair purchase price for the supply under the terms of the agreement between the parties at the time of delivery;
 - 2.2.3 the parties must promptly supply the Expert with any information, assistance and co-operation requested in writing by the Expert in connection with its determination. all correspondence between the Expert and a party must be copied to the other party;
 - 2.2.4 the Expert must be instructed to determine the price and provide it to the parties no later than 10 Business Days after the date he or she is appointed and must give each party an opportunity to make submissions;
 - 2.2.5 each party must bear its own costs in complying with this clause and the cost of a determination by the Expert must be borne in such manner as the Expert determines (having regard to the merits of the dispute).
3. Within 10 days of receiving from Mitolo written nomination of the price for a supply under clause 1.2 above the Grower may give notice in writing to Mitolo stating that the Grower wishes to sell the produce to a third party (in which case the provisions of this agreement relating to such a third party sale will apply).
4. The Grower must at all times continue to deliver produce to Mitolo in accordance with this agreement while any price determination process is taking place.



5. If the price for a supply is not finally determined within the period specified under this agreement for payment of the purchase price by Mitolo to the Grower then Mitolo will pay the price nominated by it under clause 1.2 and:
 - 5.1 if that amount is less than the price determined under this Schedule Mitolo shall pay the amount of the difference to the Grower within 5 Business Days;
 - 5.2 if that amount is more than the price determined under this Schedule the amount of the difference shall be immediately due and owing by the Grower to Mitolo and Mitolo will at its election be entitled to deduct that amount from any amount otherwise owing or which becomes owing to the Grower.

**SCHEDULE 8 – STANDARD TERMS AND CONDITIONS**

These standard terms and conditions operate to the exclusion of all other terms and conditions proposed or notified by the Grower, irrespective of whether the Grower terms and conditions were proposed or notified prior to or after the Commercial Ware Potatoes were supplied:

1. The Grower must take steps to ensure that the Commercial Ware Potatoes are protected against all damage and deterioration during transportation.
2. Subject to clause 5 of these standard terms and conditions, title to and risk in the Commercial Ware Potatoes passes to Mitolo when it has taken delivery of the Commercial Ware Potatoes at the destination specified by Mitolo and the Commercial Ware Potatoes have been graded and packed by Mitolo.
3. The Grower must ensure that its personnel engaged in the supply of the Commercial Ware Potatoes are trained, instructed, appropriately supervised and competent for the work to be performed by the Grower and that all work is performed professionally, with appropriate qualifications, care, skill and diligence.
4. Mitolo will not be deemed to have accepted the Commercial Ware Potatoes until it has had a reasonable time to inspect the Commercial Ware Potatoes. If, on inspection, Mitolo finds that any Commercial Ware Potatoes are unsafe, defective or do not meet Mitolo specifications, Mitolo may reject those Commercial Ware Potatoes by returning them to the Grower at the Grower's cost. At Mitolo's option and request, subject to the terms of the agreement between the Grower and Mitolo, the Grower must refund to Mitolo any payments made by Mitolo in respect of any such Commercial Ware Potatoes, or replace free of charge any such Commercial Ware Potatoes.
5. Mitolo will provide the Grower with a recipient created tax invoice (Invoice) within 5 Business Days of title and risk in the Commercial Ware Potatoes passing to Mitolo.
6. The Grower must ensure that each delivery docket for a delivery of Commercial Ware Potatoes contains the following details:
 - (a) Growers name and address;
 - (b) date dispatched;
 - (c) gross weight by variety/pack;
 - (d) variety;
 - (e) container type;
 - (f) destination;
 - (g) carriers company name; and
 - (h) truck registration number.
7. Labels on Commercial Ware Potatoes must all contain the following information:
 - (a) Grower's name;
 - (b) variety;
 - (c) paddock;
 - (d) weight (if using own scales); and
 - (e) date packed.
8. The purchase price for the supply of the Commercial Ware Potatoes will be determined according to the method set out in the agreement between the Grower and Mitolo.
9. Mitolo will pay the Grower the purchase price for the supply of the Commercial Ware Potatoes within 45 days from the date of the Invoice subject to the satisfactory performance of the Grower's obligations under this Agreement and acceptance of the Commercial Ware Potatoes by Mitolo. The purchase price includes all costs, taxes and duties (including GST) and expenses incurred by the Grower. The Grower will pay all transportation costs.
10. The Grower must not without the prior written consent of Mitolo, which consent will not be unreasonably withheld, sub-contract any part of the supply of Commercial Ware Potatoes.
11. The Grower must, before commencing supply of the Commercial Ware Potatoes, effect and maintain all Insurances which would ordinarily be maintained by a prudent supplier of the Commercial Ware Potatoes.
12. Mitolo may deduct from any amounts due to the Grower any amounts due from the Grower to Mitolo.



SCHEDULE 9 – ESTIMATED TOTAL CONTRACT PRICE

Based on the quantity and specifications of the supply provided for under this agreement the estimated total price payable for that supply, based on current prices (as specified in Mitolo's weekly pricing list for the current period) is as follows:

[INSERT TOTAL ESTIMATE]

The actual total price for the supply may be higher or lower than this amount according to the purchase price to be agreed or determined (as the case may be) in accordance with the terms of this agreement between Mitolo and the Grower at the relevant time specified in this agreement.



SCHEDULE 10 – ELECTION AND CONSENT TO RELEASE COMMERCIAL WARE POTATOES

GROWER: [Insert Grower Details] (Grower)

Under and subject to the Commercial Ware Potato Grower Agreement between Mitolo Group Pty Ltd (Mitolo) and the Grower (Agreement) and the conditions set out below the Grower has elected to sell Commercial Ware Potatoes (as detailed in the table below) to persons other than Mitolo and Mitolo hereby authorises that sale

Variety	Date Harvested	Tonnes

The Grower acknowledges, warrants and agrees that in accordance with the Agreement:

- the sale will not be to another grower;
- the sale is for end use consumption by consumers;
- the Grower must provide Mitolo with a report within 10 Business Days of the sale of the Commercial Ware Potatoes to a third party, detailing the volume of Commercial Ware Potatoes of each of the Specified Varieties sold and to whom they were sold;

Executed by the Grower by its duly authorised signatory:

Signature of authorised signatory

Date: _____

Name of authorised signatory

Executed by Mitolo by its duly authorised signatory:

Signature of authorised signatory

Date: _____

Name of authorised signatory