

Cawthron Testing Services – Terms and Conditions

1 Definitions

1.1 In these Terms, unless the context otherwise requires:

- 1.1.1 “Business Day” means any day other than a Saturday, Sunday, or a statutory public holiday in Nelson or New Zealand.
- 1.1.2 “GST” means goods and services tax as defined in the Goods and Services Tax Act 1985.
- 1.1.3 “Intellectual Property” means all intellectual property and associated rights and interests (including common law rights and interests) of any kind anywhere in the world whether or not registered or able to be registered including copyright, patents, trademarks, trade names, service marks, know how, trade secrets and techniques, URLs, websites, internet addresses and telephone numbers, design application and rights and algorithms.
- 1.1.4 “Order/Submission” means an accepted Order/Submission
- 1.1.5 “Order/Submission Form” means an order submitted by you to Cawthron via telephone, post, email or Website or the submission of a sample for the purchase of Services.
- 1.1.6 “Price” means the total amount payable by you for the Services including all delivery costs (including freight and carriage by any means), import/export costs, insurance costs, and any other fees, surcharges, or other charges payable by you.
- 1.1.7 “Price List” means the current list of prices for our Services which will be quoted to you by Cawthron.
- 1.1.8 “Privacy Policy” means our privacy policy as published on our website from time to time.
- 1.1.9 “Services” means any services provided by us to you and includes without limitation any related or associated services, fees or charges from us to you.
- 1.1.10 “Terms” means these Terms of Trade (as amended from time to time).
- 1.1.11 “We”, “us”, “our” and “Cawthron” means Cawthron Institute Trust Board, a charitable trust established in accordance with the Thomas Cawthron Trust Act 1924. Charities Commission registration number CC23527, and its agents, successors or assigns.
- 1.1.12 “Website” means the website operated by Cawthron from time to time.
- 1.1.13 “You” and “your” means the person(s) or entity(ies) named as the customer on the Order/Submission Form.

2 Terms and Conditions

- 2.1 All Services to be provided by Cawthron Institute Trust Board (Cawthron) will be governed by these Terms or as varied by any special terms agreed to by Cawthron in writing (Special Terms).
- 2.2 No order for Services or any Special Terms relating to that order will be deemed to have been accepted by Cawthron unless Cawthron has confirmed acceptance of the order or the Special Terms in writing. In these Terms “in writing” means any confirmation by Cawthron in writing delivered personally or sent by post, facsimile or email.
- 2.3 These Terms will prevail over any other terms unless Cawthron specifically confirms acceptance of Special Terms in writing. Unless otherwise agreed to by Cawthron in writing any Special Terms shall apply only to that specific order.

3 Services

- 3.1 In these Terms “Services” means product testing, environmental laboratory testing or audit, assurance services or any other services that Cawthron agrees to provide to the Customer in writing.

- 3.2 Cawthron will provide the Services using reasonable care and skill, adopting such methods as Cawthron considers appropriate and in accordance with any Special Terms agreed to by Cawthron in writing.
- 3.3 The Customer acknowledges that the Services are provided using the then current state of technology and methods developed and generally applied by Cawthron and involve analysis, interpretations, consulting work and conclusions. Cawthron shall use commercially reasonable degree of care in providing the Services.
- 3.4 Services that involve testing are limited to providing the results of the specific tests that the Customer has requested and that Cawthron has agreed to provide. It is solely the Customer's responsibility to determine which tests are required for a particular purpose and to interpret the results of those tests.
- 3.5 Cawthron will use the specific testing methods as requested by the customer. In the absence of this information, the Customer acknowledges that the methods of analysis used are using the then current state of technology and methods developed and generally applied by Cawthron. Cawthron shall use commercially reasonable degree of care in providing the Services.
- 3.6 The Services will be undertaken in the time period agreed to between Cawthron and the Customer and in the absence of agreement within a reasonable time. Cawthron will not be liable for any delay in providing the Services. Cawthron will use reasonable endeavours to provide Services in accordance with any agreed timeframes, however, any such timeframes are indicative only.
- 3.7 Any reports issued by Cawthron relate exclusively to the samples provided by the Customer and do not relate to the lot from which samples have been obtained.
- 3.8 Where Cawthron has agreed to provide audit and assurance services, the audit report issued by Cawthron shall relate only to the scope of services agreed to in writing by Cawthron (either in the quotation, the engagement letter, or an agency agreement).
- 3.9 Cawthron may delegate/subcontract the performance of part or all the Services to a third party and the Customer authorises the release of all information necessary to the third party for the provision of the Services.
- 3.10 Reports are issued based on information, documents and/or samples provided by, or on behalf of, the Customer and solely for the benefit of the Customer who is responsible for acting as it sees fit on the basis of such reports. Neither Cawthron nor any of its officers, employees, agents or subcontractors shall be liable to the Customer nor any third party for any actions taken or not taken on the basis of such reports nor for any incorrect results arising from unclear, erroneous, incomplete, misleading or false information provided to Cawthron.

4 Obligations of the customer

- 4.1 To enable Cawthron to provide the Services, the Customer will:
 - 4.1.1 ensure that adequate quantities of the samples and materials are provided in a safe condition. Cawthron may (at the Customer's cost) undertake initial tests on the samples, material or the site to ensure that it is safe and appropriate for Cawthron to provide the Services.
 - 4.1.2 ensure that sufficient information instructions and documentation is provided.
 - 4.1.3 where appropriate provide safe and secure access to the site and access to the Customer's representatives.
 - 4.1.4 ensure that all necessary measures are taken to ensure safety in the performance of the Services including (without limitation) complying with all regulations relating to labelling, transportation of the samples and materials, access to the sites, treatment of hazardous materials.
 - 4.1.5 inform Cawthron in advance of any hazard or danger, actual or potential associated with any samples or testing.
 - 4.1.6 immediately inform Cawthron of any change that could affect the provision of the Services or the safety of its personnel.

5 Fees and payments

- 5.1 The Customer will pay the fees for the Services agreed between the Customer and Cawthron. If the parties have not agreed on the fee payable for the Services than the Customer will pay Cawthron standard "Price List" fees for the provision of the Services.

- 5.2 Fees are in NZ Dollars and exclusive of GST, which will be paid by the Customer.
- 5.3 Cawthron will conduct review of List Prices on an annual basis, but we reserve the right to increase List Prices at any time to reflect increases in costs to Cawthron to provide the services.
- 5.4 If a quote is provided, it is available to be accepted for a maximum of 30 days from the date of the quote (unless otherwise stated in the quote).
- 5.5 Quotes and special discounts are confidential and for the company or person quoted only. They are not available or transferrable to another customer unless expressly stated in writing by Cawthron.
- 5.6 We reserve the right to withdraw any special discounts or arrangements at any time without any reason.
- 5.7 Unless otherwise agreed in writing all fees quoted are exclusive of all expenses such as travelling costs and any disbursements incurred on behalf of the Customer.
- 5.8 New clients are required to fill in a credit application form, and supply credit references before testing is undertaken, or arrange for payment prior to results being released.
- 5.9 The invoices for monthly invoiced customers will be paid by the 20th calendar day of the month following the issue of an invoice for the Services by Cawthron.
- 5.10 The fees for non-monthly invoiced customers will be paid in full within 7 working days following the issue of an invoice for the Services by Cawthron.
- 5.11 Fees will be paid without deduction, set off or counter claim and the Customer cannot retain or defer payment on account of any dispute with Cawthron.
- 5.12 If the Customer fails to pay any fees when due, Cawthron may:
- 5.12.1 commence proceedings for the collection of unpaid fees and the Customer will be liable for all costs incurred by Cawthron (including all legal costs on a solicitor – client basis).
 - 5.12.2 withhold the release of any reports until all fees have been paid in full by the Customer.
 - 5.12.3 require that part or all the fees be paid in advance of providing the Services.
 - 5.12.4 cease providing the Services to the Customer without notice.
- 5.13 If any unforeseen circumstances or expenses arise in undertaking the Services, Cawthron will endeavour to inform the Customer of any additional costs incurred by Cawthron and unless the Customer advises Cawthron not to undertake any further works, the Customer will be responsible for the additional costs.
- 5.14 Cawthron reserves the right to place:
- 5.14.1 A minimum charge of \$50 on any work carried out unless otherwise agreed.
 - 5.14.2 A surcharge for work received outside normal working hours or on public holidays to cover additional labour costs.
 - 5.14.3 A surcharge for urgent work.
 - 5.14.4 A surcharge if sample batch sizes fall below what was agreed in an agreed quote.
 - 5.14.5 A fixed fee for border inspections if applicable.

6 Samples

- 6.1 All samples become the property of Cawthron to the extent necessary for the performance of the Services.
- 6.2 Cawthron will not be required to store samples and may destroy or otherwise dispose of the samples or return the samples to the Customer (at the Customer's cost in all respects) immediately following analysis of the samples.
- 6.3 If the Customer pays for storage of samples Cawthron will take commercially reasonable steps to store the samples for the agreed period in terms of industry practice.
- 6.4 The Customer acknowledges and accepts that:
- 6.4.1 it is solely responsible for the sampling process and warrants that the sample provided to Cawthron is representative of the lot from which the samples were drawn; and
 - 6.4.2 Cawthron expresses no opinion and accepts no liability in respect of the Customer's production process or homogeneity of the sample.

7 Title to property and reports

- 7.1 Cawthron will retain title to any analysis, results, reports, or software produced by Cawthron until all fees have been paid by the Customer.
- 7.2 Cawthron will be entitled to store, use, publish or otherwise deal with all analysis, results, reports, or software so long as Cawthron does not identify the Customer, except where required by law.
- 7.3 Romalpa clause applies in that title of goods or services are retained by Cawthron until payment is received. All intellectual property rights created during the provision of the Services by Cawthron pursuant to this agreement will vest in Cawthron immediately upon creation. If required by Cawthron, the Customer will execute all documents and do all acts and things required to enable the rights to vest in Cawthron.
- 7.4 Any report provided by Cawthron (and the copyright contained therein) shall be and remain the property of Cawthron. The Customer shall not alter or misrepresent the contents of such documents in any way. The Customer shall be entitled to make copies for its internal purposes only.
- 7.5 The Customer may only reproduce or publish any report by Cawthron in full without alteration. Cawthron name, logo or service marks, or any other means of identification cannot be used in any publication by the Customer unless the Customer has obtained the prior written consent of Cawthron.

8 Limitation of liability

- 8.1 Reports are issued based on information, documents and/or samples provided by, or on behalf of, the Customer and solely for the benefit of the Customer who is responsible for acting as it sees fit based on such reports. Neither Cawthron nor any of its officers, employees, agents, or subcontractors shall be liable to the Customer nor any third party for any actions taken or not taken on the basis of such reports nor for any incorrect results arising from unclear, erroneous, incomplete, misleading or false information provided to Cawthron.
- 8.2 Cawthron shall not be liable for any delayed, partial, or total non-performance of the Services arising directly or indirectly from any event outside Cawthron control including failure by the Customer to comply with any of its obligations hereunder.
- 8.3 The liability of Cawthron in respect of any claim for loss, damage or expense of any nature and howsoever arising shall in no circumstances exceed the lesser of an amount equal to 3 times the fee paid in respect of the Service which gives rise to such claim or \$15,000.00.
- 8.4 Cawthron shall have no liability for any indirect or consequential loss including, without limitation, loss of production, loss of contracts, loss of profits, loss of business or costs incurred from business interruption, loss of opportunity, loss of goodwill or damage to reputation and cost of product recall (including any losses suffered as a result of distribution of the Customer's products subject of the Services prior to the report being released by Cawthron). It shall further have no liability for any loss, damage or expenses arising from the claims of any third party (including, without limitation, product liability claims) that may be incurred by the Customer.
- 8.5 Cawthron's total liability under any warranty in relation to Goods or Services supplied by Cawthron is limited at Cawthron's option to:
 - 8.5.1 re-performing the Services or repairing or replacing the Goods; or
 - 8.5.2 refunding the charge for the Services or the price for the Goods paid by the Customer; provided that where Cawthron
 - 8.5.3 elects to re-perform the Services or repair or replace the Goods it will use reasonable endeavours to do so as soon as practicable but will not be liable for any delay in such re-performance, replacement, or repair.
- 8.6 In the event of any claim, the Customer must give written notice to Cawthron within 60 days of discovery of the facts alleged to justify such claim and, in any case, Cawthron shall be discharged from all liability for all claims for loss, damage or expense unless proceedings are brought within six calendar months from:
 - 8.6.1 the date of performance by Cawthron of the Service which gives rise to the claim; or
 - 8.6.2 the date when the Service should have been completed in the event of any alleged non-performance.

- 8.7 Unless Cawthron explicitly agrees in writing, the Services shall be provided exclusively to the Customer and cannot be relied on by a third party. The Customer will indemnify and hold Cawthron harmless against any and all third-party claims relating to the provision of the Services to the Customer.
- 8.8 The Customer shall be responsible for and indemnifies Cawthron against all costs, damages, liabilities, and injuries that may be caused to or incurred by Cawthron or its personnel or representatives including on the sampling site, during transportation or in the laboratory by the Customer's sample or by sampling site conditions.
- 8.9 Cawthron and the Customer agree that any Goods and Services supplied pursuant to these Terms are for the purposes of a business and hence the statutory guarantees of the Consumer Guarantees Act 1993 do not apply. Should those statutory guarantees apply, these Terms shall be interpreted subject to the Consumer Guarantees Act 1993.

9 Force Majeure

- 9.1 If Cawthron is prevented from performing or completing the Services for any cause outside Cawthron control, including, but not limited to, acts of God, pandemics, war, terrorist activity or industrial action; electricity outage; failure to obtain permits, licenses or registrations; illness, death or resignation of personnel or failure by Customer to comply with any of its obligations the Customer will pay to Cawthron:
- 9.1.1 the amount of all non-refundable expenses incurred by Cawthron; and
- 9.1.2 a proportion of the fee equal to the proportion of the Services actually carried out (provided that if the Services cannot be performed as a result of an act or omission on the part of the Customer, the Customer will pay the full fee and all expenses incurred by Cawthron),
- 9.1.3 and Cawthron will be relieved of all responsibility whatsoever for the partial or total non-performance of the Services.

10 Miscellaneous

- 10.1 If any one or more provisions of the Terms are found to be illegal or unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired.
- 10.2 Except as expressly provided in these Terms or the Special Terms, the Customer may not assign or transfer any of its rights without Cawthron prior written consent.
- 10.3 The provisions of the Consumer Guarantees Act 1993 shall not apply to the Services provided by Cawthron to the Customer.
- 10.4 The parties acknowledge that Cawthron provides the Services to the Customer as an independent contractor and that this agreement does not create any partnership, agency, employment, or fiduciary relationship between Cawthron and the Customer.
- 10.5 Any failure by Cawthron to require the Customer to perform any of Cawthron obligations under these Terms or Special Terms shall not constitute a waiver of its right to require performance of that or any other obligation.
- 10.6 This agreement is exclusively governed by the laws of New Zealand and the parties submit to the exclusive jurisdiction of the New Zealand courts.
- 10.7 The Terms may be modified in writing from time to time by Cawthron and the order for Services will be governed by the most recent version of these Terms that are in effect at the time Cawthron accepts the order.
- 10.8 Unless Cawthron specifically confirms acceptance in writing, Cawthron will not be bound by any terms and conditions set out in the Customer's own documentation including but not limited to Purchase Orders, Submission Forms, emails.