

Terms of Trade - Merchant

1. Agreement

- 1.1.** The Grower agrees to deliver, and the Merchant agrees to buy Produce of the type, Quantity, Quality and Specifications stated in this Agreement or as ordered by the Merchant and confirmed in writing by the Grower from time to time, for the price/s stated in, or calculated in accordance with this Agreement.
- 1.2.** This Agreement will commence on the Start Date and will continue for the Term and any extensions of the Term as agreed in writing between the parties.
- 1.3.** The parties agree that the Special Conditions form part of this Agreement if any stated.

2. Merchant's reporting obligations

- 2.1.** For each Reporting Period, the Merchant will give the Grower a Statement for the Reporting Period, specifying for the Produce received by the Merchant during the Reporting Period:
 - (a) the quality and quantity of the Produce bought by the Merchant;
 - (b) the date or dates of the purchases (by the third party) of the Produce;
 - (c) the price paid for the Produce;
 - (d) if the price for the Produce was determined by a method or formula specified in the Commercial Terms Schedule:
 - i. the gross sale price of the Produce to the third party;
 - ii. the details of any Produce not sold; and
 - iii. the details of any Produce destroyed, or to be destroyed, and the reason why the Produce was, or is to be, destroyed; and
 - (e) the date on which the Produce was delivered to the Merchant.
- 2.2.** The Merchant will give the Statement referred to in clause 2.1 to the Grower within the Statement Period.

3. Merchant's other obligations

- 3.1.** During the period the Grower's Produce is under the Merchant's control, the Merchant will exercise all reasonable care and skill in handling and storing the Produce to ensure that the Produce remains of the highest quality possible.
- 3.2.** The care and skill the Merchant must exercise under clause 3.1 must be exercised until the ownership of the Produce passes to the purchaser of the Produce.

4. Payment

- 4.1.** Subject to clause 10, the Merchant will pay the Price to the Grower for the purchase of the Grower's delivered Produce.
- 4.2.** The Grower will invoice the Merchant for each delivery of Produce.
- 4.3.** Payment must be made within the Time for Payment for Produce to the Grower's Bank Account.

- 4.4.** If the Merchant has not paid an amount for the delivery of Produce due to the Grower for that produce within the Time for Payment of Produce, the Grower may, in addition to the Grower's rights at law to bring an action for breach of contract, take one or both of the following actions:
- (a) suspend any further deliveries under this Agreement until the amount owed is paid; and/or
 - (b) embark on dispute resolution procedures
 - (c) cancel this Agreement.

- 4.5.** Before taking action under clause 4.4 (a) or (b), the Grower must give written notice to the Merchant of the Grower's intention to take the action.

5. Merchant Services

- 5.1.** The Merchant will supply the Services at the Fee for Services.

- 5.2.** The Grower will pay the Fee for Services at or before the Time for Payment of Services.

6. Delivery of Produce

- 6.1.** For the purposes of this Agreement, delivery of Produce occurs when the Produce arrives at the Place of Delivery.
- 6.2.** The Grower will bear the costs of delivery of the Produce to the Merchant, unless agreed otherwise by the parties in writing.
- 6.3.** The Grower will include with each delivery, documentation listing the quantity and type of all Produce in the delivery.
- 6.4.** The Merchant will provide secure and suitable off-loading facilities at the Place of Delivery so as to facilitate the safe and timely off-loading of the Produce. The Merchant will be responsible for the off-loading of the Produce.
- 6.5.** The Merchant will be responsible for giving, or taking reasonable steps to ensure that the Grower is given, a document evidencing receipt of delivered Produce.
- 6.6.** The Merchant will accept as proof of delivery of Produce by the Grower, any document that acknowledges, reflects or evidences delivery:
- (a) where delivery is to an address that is the usual place of business of the Merchant or the Place of Delivery, given to the Grower by it, its officers, employees or agents; or
 - (b) where delivery is to an address that is not the usual place of business of the Merchant or the Place of Delivery, given to the Grower by any person who accepts delivery at that address and has the actual or ostensible authority of the Merchant or is a person who is apparently an adult and appears to be engaged in the service of the business at that address.

7. Type of Produce

The Grower will deliver the types of Produce to the Merchant in accordance with the terms of this Agreement or as otherwise agreed between the parties in writing.

8. Specification of Produce

Produce delivered by the Grower must meet the specification requirements provided in this Agreement.

9. Quantity requirements

Produce delivered by the Grower must meet the Quantity in accordance with the terms of this Agreement or as ordered by the Merchant and confirmed in writing by the Grower from time to time.

10. Rejection of Produce

- 10.1.** The Merchant will accept and be deemed to have accepted delivery of all Produce delivered to the Merchant unless the Merchant rejects the Produce as set out in this clause 10.
- 10.2.** The Merchant may reject such part of the Produce delivered by the Grower that does not materially satisfy the type or Quality requirements specified in this Agreement.
- 10.3.** The Merchant may also reject the Produce if:
 - (a) the Grower does not have title in the Produce delivered by the Grower; or
 - (b) if the Produce is not delivered in accordance with this Agreement.
- 10.4.** A rejection by the Merchant is not effective (and the Merchant is deemed to have accepted the Produce) unless within 24 hours after the time at which the Produce is delivered, the Merchant notifies the Grower in writing that the Produce is rejected and provides valid reasons for the rejection.
- 10.5.** Notwithstanding clause 10.3, if the Merchant rejects the Produce, the Merchant must, within 24 hours of issuing the notice of rejection to the Grower, advise the Grower that the Produce has been rejected.
- 10.6.** Where the Produce is rejected by the Merchant, the Merchant will hold the Produce at the Place of Delivery for collection by the Grower at an agreed time, unless the grower agrees in writing to renegotiate the sale of the rejected produce to the Merchant including but not limited to negotiating a class for the produce other than class 1 produce as defined by FreshSpecs produce specification.

11. Pooling of produce

- 11.1.** If the commercial terms schedule elects that pooling of the produce is not permitted, then the Merchant may not pool Produce delivered by the Grower under this Agreement with other produce.
- 11.2.** If the Commercial terms schedule elects that pooling of the produce is permitted then the Merchant may pool Produce delivered by the Grower under this Agreement with other produce if:
 - (a) the other produce is of the same quality as the Produce delivered by the Grower; and
 - (b) the Produce and other produce meet the Quality requirements specified in this Agreement.
- 11.3.** Where the Merchant pools Produce in accordance with this Agreement, the amount payable to the Grower will be a proportion of the total proceeds received by the Merchant for pooled produce that is equal to the proportion of the pooled produce that was contributed by the Grower.

12. Title

- 12.1.** The Grower warrants that it has title in the Produce that it delivers to the Merchant.
- 12.2.** Title in the Produce supplied by the Grower in accordance with this Agreement will pass to the Merchant:

- (a) where the Price of the Produce has been agreed to by the Merchant and Grower before delivery as specified in this Agreement, on delivery of the Produce to the Merchant;
- (b) where clause 12.2(a) does not apply and the Merchant is to provide a Services, at the time the Services are completed; or
- (c) where the circumstances in clauses 12.2(a) and (b) do not apply, at the time that the parties agree on a price for the Produce.

13. Insurance

- 13.1.** The Merchant has insurance for the Produce under the Merchant's control. [The insurance policy that the Grower takes out will depend on when title passes because generally, once title has passed, the Grower will no longer need insurance because the risk passes to the Merchant with title to the produce. If title passes on delivery and delivery is when the produce arrives at the Place of Delivery then the Grower will need insurance up until the point that the produce arrives at the Place of Delivery. The Merchant will therefore need insurance over the Produce. The Grower may consider taking out insurance to cover any excess amount that the Merchant's insurance does not cover.]
- 13.2.** The details of the Merchant's insurance policy (**Insurance Policy**) are as follows:
- (a) the Insurance Policy is with WFI
 - (b) the maximum amount of insurance cover provided by the Insurance Policy in respect of claims that may be made in relation to the Produce is AUD \$70,000.00
 - (c) the Insurance Policy covers for loss by fire, theft and accidental damage (other than deterioration of quality or any other inherent losses).

14. Limitation of Liability

- 14.1** Subject to State and Federal laws, notwithstanding any other clause of this Agreement to the contrary, to the maximum extent permitted by law, the Grower's total aggregate liability to the Merchant arising out of or in connection with this Agreement is limited to 100% of the Price paid by the Merchant to the Grower in cleared funds over the immediate prior [Grower to consider liability exposure for a breach of this Agreement. The maximum amount of liability must be reasonable and could be tied to the total amount paid by a Merchant to a Grower over a determinate period of time or a set amount. It is important to note that this clause **Error! Reference source not found.** is subject to State and Federal laws and may be unenforceable if unreasonable.]
- 14.2** Notwithstanding any other clause of this Agreement to the contrary, to the maximum extent permitted by law, the Grower shall not be liable for:
- (d) any consequential losses; and/or
- 14.3** any losses, expenses or damages arising from a breach of this Agreement by the Grower to the extent that those losses, expenses or damages were a direct or indirect result of the actions or inaction by the Merchant.

15 Dispute resolution

- 15.1** In the event that there is a dispute between the parties under this Agreement or the Code, each party should contact the other party's representative named in the Commercial Terms schedule.
- 15.2** The parties agree that if a dispute arises between them in relation to any matter covered by this Agreement or the Code, they will follow the dispute resolution procedure set out in Part 5

of the Code. [Pursuant to clause 38(1) of the Code parties may agree on a different procedure to the procedure set out in Part 5 of the Code.]

16 Termination

[Clause 16(q) of the Code provides that the Agreement must include the process for terminating the Agreement but does not provide any further guidance. The parties may determine how the Agreement is terminated.]

- 16.1** This Agreement can be terminated by either party giving [four (4)] weeks' written notice of termination to the other party.
- 16.2** Either party may terminate this Agreement with immediate effect by giving notice in writing to the other party, if the other party:
 - (a) is in material breach of this Agreement such that the breach cannot be remedied;
 - (b) is in breach of this Agreement and fails to remedy the breach within 14 days of receiving written notice of the breach; or
 - (c) if an Insolvency Event happens to the other party.
- 16.3** Despite anything else in this Agreement, where the Term of this Agreement is 90 days or more, or is not specified, either party may terminate this Agreement at any time within the cooling-off period being [14 days] after the day on which this Agreement was entered into.
- 16.4** Expiration or termination of this Agreement does not affect:
 - (a) any rights of the parties which may have accrued before the date of termination; or
 - (b) the rights and obligations of the parties which survive termination or expiry of this Agreement.
- 16.5** Upon termination or expiry of this Agreement for any reason each party must return to the other party all confidential information and any intellectual property of the other party, or if not capable of return, destroy it and certify its destruction to the other party.
- 16.6** Where this Agreement is terminated pursuant to this clause 16, any trade that has occurred under this Agreement before the termination is governed by the terms of this Agreement.
- 16.7** Subject to clause 16.8, a party to this Agreement who receives a payment (of money or other valuable consideration) for the purposes of, and directly related to, trade that would have occurred after the termination of the Agreement, must return the payment to the party who made the payment within 14 days after the day on which the Agreement is terminated.
- 16.8** A party required to return a payment under clause 16.7 may deduct, from the amount to be returned, reasonable expenses incurred under this Agreement for the purposes of, and directly related to, trade that would have occurred after the termination of this Agreement.

17 Goods and Services Tax

In this clause 17, a word or expression defined in the GST Act has the meaning given to it in that Act.

17.1 GST Gross Up

If a party makes a taxable supply under or in connection with this Agreement, then the amount payable by the recipient of the supply to the supplier of the supply is equal to the consideration for the supply (less any GST payable on the supply) (the GST exclusive consideration) increased by an amount calculated by multiplying the GST exclusive consideration by the rate of GST prevailing at the time the supply is made.

17.2 Reimbursement

If a party must reimburse or indemnify another party for a loss, cost or expense, the amount to be reimbursed or indemnified is first reduced by any input tax credit the other party is entitled to for the loss, cost or expense, and then is increased in accordance with clause 17.1.

17.3 Tax Invoice

A party need not make a payment for a taxable supply made under or in connection with this Agreement until it receives a tax invoice for the supply to which the payment relates.

18 Variation and Changes in Arrangements

The parties may vary this Agreement including the Commercial Terms Schedule by signature of both parties or a written agreement.

19 Miscellaneous

19.1 Interpretation

In this Agreement, the terms in the Commercial Terms Schedule have the meaning as set out in the Commercial Terms Schedule.

19.2 Legal Advice

Each of the parties acknowledge that they have had the opportunity to seek legal advice in respect of the terms and conditions of this Agreement, and further acknowledge and confirm they have read and understood the terms and conditions of this Agreement.

19.3 Notices

- (a) A notice under this Agreement may be given by any electronic means including by email but must be given to the address details stated in the Grower's or Merchant's details (as applicable) in the Commercial Terms Schedule.
- (b) Notice given in accordance with clause 19.3(a) takes effect when received (or at a later time specified in it), and is taken to be received:
 - i. if hand delivered, on delivery;
 - ii. if sent by prepaid post, 3 Business Days after the date of posting (or seven Business Days after the date of posting if posted to or from outside Australia);
 - iii. if sent by facsimile, when the sender's facsimile system generates a message confirming successful transmission of the notice in entirety; and
 - iv. if sent by email, when the sender's email system confirms successful delivery of the notice to the recipient's server.
- (c) but if the delivery, receipt or transmission is not on a Business Day or is after 5.00 pm on a Business Day, the notice is taken to be received at 9.00 am on the Business Day after that delivery, receipt or transmission.

19.4 Without Breach

This Agreement will terminate upon mutual written agreement of the parties.

19.5 Assignment

No party can assign, charge, encumber or otherwise deal with any rights or obligations under this Agreement, or attempt or purport to do so, without the prior written consent of all other parties.

19.6 Costs

Each party must pay its own costs of negotiating, preparing and executing this Agreement.

19.7 Counterparts

This Agreement may be executed in counterparts. All executed counterparts constitute one document.

19.8 No Merger

The rights and obligations of the parties under this Agreement do not merge on completion of any transaction or matter contemplated by this Agreement and are additional to any right, power or remedy which it may have under general law or otherwise.

19.9 Entire Agreement

This Agreement constitutes the entire agreement between the parties in relation to its subject matter and supersedes any previous arrangements between the parties in relation to that subject matter. The only enforceable obligations and liabilities of the parties in relation to the subject matter of this Agreement are those expressed in the provisions of this Agreement.

19.10 Further Action

Each party must do, at its own expense, everything reasonably necessary (including executing documents) to give full effect to this Agreement and the transactions or matters contemplated by it.

19.11 Severability

A clause or part of a clause of this Agreement that is void, illegal or unenforceable may be severed from this Agreement and the remaining clauses or parts of the clause of this Agreement continue in force.

19.12 Waiver

A party does not waive a right, power or remedy if it fails to exercise or delays in exercising the right, power or remedy. A single or partial exercise of a right, power or remedy does not prevent another or further exercise of that or another right, power or remedy. A waiver of a right, power or remedy must be in writing and signed by the party giving the waiver.

19.13 Relationship

Unless expressly stated otherwise, this Agreement does not create a relationship of employment, trust, agency or partnership between the parties.

19.14 Obligation to Act in Good Faith

Both parties must at all times deal with the other party to this Agreement in good faith.

19.15 Time is of the Essence

Time is of the essence of this Agreement in respect of a time for performance of any obligation in this Agreement. If the parties agree to vary any time requirement of this Agreement, any varied time requirement will be of the essence of this Agreement.

19.16 Cumulative Rights

The rights, powers and remedies of the parties under this Agreement are cumulative and do not exclude any other rights, powers or remedies provided by law independently of this agreement.

19.17 Governing Law and Jurisdiction

This Agreement is governed by the laws of the state or territory nominated in the Commercial terms schedule WA and each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of WA

20 Definitions

In this Agreement–

Agreement means this agreement comprising the Commercial Terms Schedule and the Terms and Conditions.

Business Day means a day on which banks are open for general banking business in the state or territory nominated in the commercial terms schedule other than a Saturday, Sunday or public holiday.

Code means the Horticulture Code of Conduct prescribed by the *Competition and Consumer (Industry Codes–Horticulture) Regulations 2017*, as amended from time to time.

Grower means the person or entity specified in the Commercial Terms Schedule.

Produce Specifications means produce specifications published by Fresh Markets Australia

Insolvency Event includes:

- (a) the party becoming insolvent within the meaning of section 95A of the Corporations Act 2001 (Cth);
- (b) the party ceasing to carry on its business, ceasing to be able to pay its debts as they become due or suspending payment generally, or threatening to cease to carry on its business or to pay its debts;
- (c) a meeting being convened, resolution proposed, petition presented or order made for the winding up of the party;
- (d) any step being taken to appoint a receiver, receiver and manager, provisional liquidator, liquidator, administrator or other like person in relation to all or any material asset of the party;
- (e) the party disposing of the whole or a substantial part of its assets, operations or business, other than in the ordinary course of business;
- (f) a mortgagee or charge taking, attempting, or indicating an intention to exercise its rights under any security of which the party is the mortgagor or charger; or
- (g) any step being taken by the party to enter any arrangement with, or assignment for the benefit of, its creditors other than for the purposes of a bona fide scheme of solvent reconstruction or amalgamation.

Produce means the produce described in the Commercial Terms Schedule.

Merchant means a person or entity specified in the Commercial Terms Schedule.

Statement means a statement provided to the Grower by the Merchant specifying the Produce sales details for the Reporting Period in accordance with clause 2.1.