VERSION 4
JANUARY 2024

ABN: 82 167 443 334

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Horticulture Produce Agreement - Merchant

1. Introduction

For the term of this Agreement, the Grower agrees to deliver, and the Merchant agrees to buy, Produce of the type, quantity, quality and specifications set out in this Agreement or as ordered by the Merchant from time to time, for the price(s) stated in, or calculated in accordance with the formula or method (as the case may be) set out in the Schedule.

This Agreement will commence on the Commencement Date and will continue unless it is terminated in accordance with clause 19 of this Agreement.

2. Terms and Conditions

2.1 General

(a) This Agreement is effective from the Commencement Date and shall apply to all transactions between the Merchant and the Grower on or after the Commencement Date unless:

(1) by specific written notice to the contrary;

(2) this Agreement is replaced by agreement at a later date; or

(3) the transaction is not a transaction that would be covered by the Code.

(b) The Merchant will purchase the Produce from the Grower as a Merchant, for the purposes of the Code.

2.2 Acknowledgement by Grower

The Grower acknowledges having read and understood the Merchant's Terms of Trade and that the Merchant's Terms of Trade and the Schedule form part of this Agreement and apply to all transactions between the Merchant and the Grower. If a provision of this Agreement conflicts with the Merchant's Terms of Trade, the provisions of this Agreement prevail.

2.3 Transfer of Title and Risk

(a) The parties acknowledge that despite the receipt of Produce by the Merchant pursuant to this Agreement, title and risk in respect of the Produce shall only pass in accordance with subclause 2.3(b).

(b) Despite anything else in this Agreement, title to the Produce will only pass to the Merchant if the Purchase Price of the Produce, or a method or formula to calculate the Purchase Price, has been agreed to by the Merchant and Grower before Delivery of the Produce by the Merchant – title to the Produce will pass on Delivery of the Produce to the Merchant.

(c) The Grower covenants and warrants that:

(1) they have all right, title and interest in and to the Produce;

(2) title will pass to the Merchant clear of all encumbrances, claims and other adverse interests; and

(3) the Grower is the grower of the Produce.

(d) The Merchant will assume risk in respect of the Produce once title to the Produce passes to the Merchant under subclauses 2.3(a) and 2.3(b).

(e) During the period the Produce is under the Merchant's control, the Merchant will exercise all reasonable care and skill in handling and storage to ensure that the Produce remains of the highest quality possible having regard to the quality and state of the Produce upon receipt by the Merchant.

(f) The reasonable care and skill the Merchant must exercise under clause 2.3(e) must be exercised until title and risk in the Produce passes to the Merchant.

(g) The Merchant shall not be obliged to keep insurances in respect of Produce in their legal and physical control. If the Merchant does have insurance, the Merchant's insurer, the maximum amount of insurance cover provided by the Merchant's insurance policy in respect of claims that may be made and the defined events covered by the insurance including whether the insurance covers fire, theft and accidental damage (other than deterioration of quality or any other inherent losses) (**Insurance**), is set out in the Schedule. The Merchant will not be liable for loss or damage to the Produce arising from any cause or event outside of the control of the Merchant beyond the extent of the cover provided by the Insurance (if any). If the details of Insurance in the Schedule are blank, the Merchant does not hold Insurance.

3. Price Determination

3.1 The Purchase Price for Produce shall be either:

(a) determined as an Agreed Price for the specific Produce in writing between the Merchant and the Grower either:

(1) prior to Delivery of the Produce to the Merchant; or

(2) immediately upon Delivery of the Produce to the Merchant; or

(b) an amount calculated by a method or formula set out in the Schedule;

as selected by the parties in the Schedule.

3.2 If clause 3.1(a) applies, the Agreed Price must be agreed by the Merchant and the Grower in writing. If there is no agreement upon price in respect of any Produce the relevant Produce shall be deemed to be rejected.

4. Merchant Payments and Reporting Obligations

4.1 The Merchant agrees to make payments to the Grower in the following manner -

(a) Payment must be made within the Payment Period.

(b) Such payments shall be by cheque or direct bank deposit to the credit of the Grower as specified in writing by the Grower.

(c) The Merchant may set off any amount owing by the Merchant to the Grower against any amount due for payment (including under any indemnity, reimbursement obligation or in respect of a Return) by the Grower to the Merchant under this Agreement or any other agreement (including for any Services carried out by the Merchant to the Grower provided that the fees are disclosed and the Services are set out in the Schedule).

4.2 The Merchant is authorised to deduct from any amount owing to the Grower the relevant amounts with respect to the following–

(a) any payments made on behalf of the Grower where the Merchant has agreed to make such payments (e.g. transport/unloading/packaging);

(b) levies and fees for service payable under State or Commonwealth legislation or any voluntary arrangement; and

(c) Goods and Service Tax in respect of any item for which a tax invoice has been issued.

4.3 The Merchant will not charge the Grower for Services performed by the Merchant, other than as set out in this Agreement.

4.4 The Merchant will provide a statement to the Grower containing the following details, covering the Reporting Period (**Statement**) –

(a) Grower's reference or shipping note number;

(b) description of the quality of Produce purchased from the Grower by the Merchant during the Reporting Period;

(c) details of the quantity of Produce purchased from the Grower by the Merchant during the Reporting Period;

(d) the date or dates of the purchases of Produce from the Grower by the Merchant during the Reporting Period;

(e) the Purchase Price for the Produce purchased from the Grower by the Merchant during the Reporting Period;

(f) if the Purchase Price was determined by a method or formula:

(1) the Gross Sale Price of the Produce;

(2) the basis on which the Gross Sale Price is shown (by way of example only, "per unit", "per consignment/lot", "per pallet", etc);

(3) details of any Produce not sold by the Merchant during the Reporting Period; and

(4) details of any Non-Complying Produce that is disposed of, or otherwise dealt with, in accordance with clauses 10.1, 10.2, 10.3, 10.4, 10.6 and 10.8 of this Agreement during the Reporting Period and, where Produce is to be destroyed, the reason why the Produce was, or is to be, destroyed;

(g) for Produce physically received by the Merchant from the Grower during the Reporting Period, the date on which the Produce was physically received by the Merchant;

(h) for Produce Delivered to the Merchant from the Grower during the Reporting Period, the date on which the Produce was Delivered to the Merchant; and

(i) any amounts deducted during the Reporting Period by the Merchant pursuant to clause 4.2.

4.5 The Statement must be given to the Grower within the Statement Period.

4.6 The Merchant will issue a tax invoice to the Grower in respect of any item for which Goods and Services Tax is chargeable.

5. Grower Obligations

5.1 The Grower agrees to provide documentation that is suitable to the Merchant that accurately describes the quantity, variety, size, class, description and characteristics of the Produce, including packaging, prior to delivery to the Merchant.

5.2 The Grower warrants that:

(a) the Produce dispatched to the Merchant is fit for human consumption and complies with any statutory regulations including food safety, packaging and/or labelling; and

(b) it has complied with the National Measurement Act with respect to the Produce.

5.3 The Grower warrants that the Produce dispatched to the Merchant is fit for its purpose and:

(a) in every case – is packed or presented and complies with the written Produce Specification Requirements including but not limited to quality and shelf life (**Delivery Requirements**) provided by the Merchant to the Grower from time to time prior to the Purchase Price being calculated with respect to the Produce or as are otherwise agreed to in writing between the Merchant and the Grower; and

(b) is of the grade/class as stamped on the packaging in which the Produce is contained, (**Product Specifications**).

5.4 The Grower must not dispatch Produce to the Merchant that:

(a) does not comply with the Product Specifications;

(b) does not comply with the Produce Specification Requirements;

(c) has not been solicited by the Merchant; and

(d) notwithstanding subclauses 5.4(a), 5.4(b) and 5.4(c), where this Agreement has not been agreed to in writing by the Grower.

5.5 Unless otherwise agreed with the Merchant, the Grower will;

(a) implement and maintain an industry recognised Hazard Analysis and Critical Control Point (**HACCP**) based food safety and quality system that is subject to annual third party audit; and

(b) be certified to:

(1) Freshcare Food Safety and Quality Standard;

(2) GLOBALG.A.P. Integrated Farm Assurance; or

(3) Safe Quality Food (SQF).

(c) provide copies of any current certification with respect to HACCP or any of the certifications obtained under subclause (b)(1)-(3) above to the Merchant.

5.6 The Grower agrees to supply details of their registered Australian Business Number (**ABN**) prior to any payment being made by the Merchant.

6. Services by Merchant

6.1 The Merchant will supply the Service (if any) to the Grower.

6.2 The Grower will pay Additional Fees for Services referred to in clause 6.1 and provided by the Merchant as set out in the Schedule.

6.3 The amount to be paid by the Grower for the Service provided by the Merchant shall be calculated upon the Service being completed.

6.4 The Grower will pay the amount calculated under clause 6.3 within the number of Business Days of the Merchant providing the Service specified in the Schedule.

7. Liability of Grower

7.1 The Grower shall be liable to insure (for defined events including fire, theft and accidental damage and other than deterioration of quality or any other inherent losses) the Produce until Delivery and the Merchant shall not be liable for any loss or damage to the Produce by the Grower's failure to do so.

7.2 The Grower shall be liable to compensate the Merchant for all direct losses, damages, costs, claims and expenses which the Merchant may incur as a result of any act or omission of the Grower other than to the extent that the loss, damage, claim or cost was contributed to by a negligent act or omission by the Merchant.

8. Liability of Merchant

8.1 Provided always that the Merchant has exercised reasonable care and skill (and otherwise acted in good faith) in providing the Service (to the maximum extent permitted by the Code and at law) the Merchant shall not be liable to the Grower as to:

(a) the accuracy, description, relevance, completeness, merchantable quality, fitness for any purpose or any other matter relating to the Service under this Agreement;

(b) loss of, or damage to, the Produce by any cause (including lawful confiscation);

(c) any damage to property or death of, or injury to, any person caused directly or indirectly by the Produce and/or the Service;

(d) any claim against the Merchant in relation to the Service, the Produce or the consumption of the Produce; and

(e) any other thing in relation to which the Merchant has assumed the risk or liability under this Agreement.

8.2 The Merchant shall be liable to compensate the Grower for all direct losses, damages, costs, claims and expenses which the Grower may incur as a result of any negligent act or omission of the Merchant other than to the extent that the loss, damage, claim or cost was contributed to by a negligent act or omission by the Grower.

9. Complying and Non-Complying Produce

9.1 The Grower must ensure that all Produce supplied to the Merchant, complies with clauses 5.1, 5.2 and 5.3, or that Produce will be treated as Non-Complying Produce.

9.2 The Merchant must ensure that all Non-Complying Produce is dealt with in accordance with this Agreement, including without limitation clause 2.3(e).

10. Effect of Produce being Non-Complying Produce – Pre-Delivery and After Delivery

10.1 Where this Agreement provides that Produce is to be treated as Non-Complying Produce and either Delivery has not yet occurred or the Produce is treated as Non-Complying Produce on Delivery occurring, then the Merchant shall be entitled prior to or immediately upon Delivery occurring to elect (the day the election is made being the **Non-Compliance Day**) to:

(a) reject all of the Produce;

(b) accept all of the Produce; or

(c) accept part of the Produce and reject the balance of the Produce.

10.2 Where the Merchant elects to accept all or part of the Produce under clause 10.1, or fails to give a notice under clause 10.3 to reject all or part of the Produce within 2 Business Days after the Produce has been Delivered to the Merchant, or claims a credit for Produce under clause 12.1 then the Produce will be

accepted by the Merchant (**Accepted Produce**), and this Agreement shall apply to require the Merchant to purchase the Accepted Produce for the Purchase Price relevant to that Accepted Produce.

10.3 Where the Merchant elects to reject all or part of the Produce (the **Rejected Produce**) under clause 10.1, then subject only to clause 10.3(d):

(a) the Merchant shall be deemed not to accept the Rejected Produce, and the Grower shall retain title to and risk in and to the Rejected Produce;

(b) the Grower is not entitled to the Purchase Price with respect to the Rejected Produce;

(c) the Merchant will within 24 hours of the Non-Compliance Day advise the Grower by telephone, fax, e-mail, or other electronic means of the rejection; and

(d) within 2 Business Days of the Non-Compliance Day, the Merchant will advise the Grower in writing of the rejection and the reasons for such rejection and request that the Grower advise as to whether the Grower:

(1) wishes to retake possession of the Rejected Produce;

(2) requires an independent inspection and assessment of the condition of the Rejected Produce to determine whether an Inspection Certificate should be issued at the Grower's cost; or

(3) wishes to make other arrangements for the storage or warehousing of the Rejected Produce, sale or resale of the Rejected Produce or its removal from the Merchant premises.

10.4 The Merchant may also, in advising the Grower of Rejected Produce, invite the Grower 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 under the FreshSpecs Produce Specifications.

10.5 The right of the Merchant to reject Produce under this Agreement cannot be deemed to be waived by past acceptance of Produce of a similar quality.

10.6 The Merchant will exercise reasonable care and skill in handling and storing any Rejected Produce until the Rejected Produce has been dealt with in accordance with clause 10.7.

10.7 Despite anything else in this Agreement, the Merchant may elect to destroy and dispose of the Rejected Produce, or deliver the Rejected Produce to the Grower if:

(a) the Grower does not respond within 24 hours of notification in accordance with clause 10.3(d);

(b) the Grower fails to retake possession of the Produce within 5 Business Days of the Grower indicating an intention to do so under clause 10.3(d); or

(c) no agreement on the Purchase Price has been reached between the Grower and the Merchant within a reasonable period following the time the Produce is Delivered to the Merchant, provided that the Merchant must use reasonable endeavours to contact the Grower to negotiate a Purchase Price and must act reasonably in exercising its rights under this clause 10.7(c). The parties acknowledge and agree that, in endeavouring to negotiate a Purchase Price, the Merchant may offer a price to the Grower for the Rejected Produce in accordance with prevailing market conditions at the time and this Agreement as well as any other additional Services that the Merchant reasonably considers may need to be provided.

10.8 Where clause 10.7 applies, any destruction, disposal and/or delivery of Produce is at the Grower's expense.

11. Pooling of Produce

11.1 The Merchant may pool Produce (whether or not the Produce has been rejected) supplied 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) either:

(1) the Grower's Produce and the other Produce meet the quality requirements, specified in clause 5.3 of this Agreement; or

(2) the Produce is accepted by the Merchant pursuant to clause 10.4.

11.2 Where the Merchant pools Produce in accordance with clause 11.1, the amount payable to the Grower will be a proportion of the total proceeds that is equal to the proportion of the pooled Produce that was contributed by the Grower.

12. Effect of Produce being Non-Complying Produce – After Purchase

12.1 Where Produce is to be treated as Non-Complying Produce and the Produce has been purchased by the Merchant, then the Merchant shall be entitled within 2 Business Days of the Merchant forming the opinion that the Produce is Non-Complying Produce to elect (the day the election is made being the **Non-Compliance Day**) to:

(a) claim a credit for the Produce under clause 12.2;

(b) not claim a credit for the Produce under clause 12.2; or

(c) claim a credit for part of the Produce,

PROVIDED THAT the Non-Compliance Day must be within a reasonable time (determined by the Merchant) of the Non-Complying Produce being purchased by the Merchant (or received by the Merchant, in the case of a Return) having regard to matters such as:

(1) the type of the Non-Complying Produce,

(2) the quality, grade and anticipated shelf life of the Non-Complying Produce determined on the basis that it was Complying Produce.

12.2 Where the Merchant elects to claim a credit for all or part of the Produce under clause 12.1, then:

(a) the Merchant will advise the Grower by telephone, fax, email or any other electronic means of the claim for credit;

(b) within 2 Business Days of the Non-Compliance Day, the Merchant will advise the Grower in writing of the claim for credit and the reasons for such claim for credit; and

(c) the Merchant is entitled at their discretion to deduct from the amounts payable by the Merchant to the Grower under clause 4.1:

(1) up to the amount paid or payable by the Merchant to the Grower for the Produce; and

(2) where there has been a Return and the Merchant elects to destroy the Produce, the costs incurred by the Merchant in destroying the Produce.

12.3 For the avoidance of doubt, the Merchant shall only be entitled to claim a credit pursuant to this clause 12 for Non-Complying Produce.

13. Returns of Produce

13.1 The Grower agrees that any claims for credit which result following the sale (or re-sale) of any Produce by the Merchant to a third party, which claims are accepted by the Merchant (**Return**), due to the Produce being Non-Complying Produce, may be dealt with under clause 12.1.

13.2 Produce returned under clause 13.1 will be Non-Complying Produce and subject to clauses 4.4, 12.1 and 12.2 of this Agreement.

13.3 For the avoidance of doubt, this clause 13 shall only apply to Non-Complying Produce.

14. Dispute Resolution

14.1 In the case of a dispute that may arise under this Agreement:

(a) the person that the Merchant should contact in that event, on behalf of the Grower (**Grower's Contact**) is set out in the Schedule;

(b) the person that the Grower should contact in that event, on behalf of the Merchant (**Merchant's Contact**) is set out in the Schedule;

(c) the Merchant and the Grower shall use the following to resolve the dispute:

(1) if required by the Merchant – the Merchant's own internal dispute resolution procedure (as notified in writing by the Merchant to the Grower); and/or

(2) any Fresh Markets Australia dispute resolution procedure in place from time to time;

(3) the dispute resolution procedures under Part 5 of the Code; and/or

(4) any other dispute resolution procedure agreed to by the parties and contained in the Schedule; and

(d) in the case of a dispute relating to quality, the FreshSpecs Produce Specifications will apply as the benchmark standard for all Class 1 Produce (as defined in the FreshSpecs Produce Specification).

(e) The parties acknowledge that if a party begins the procedure set out in clause 40 of the Code to resolve a dispute that arises under this Agreement, the dispute resolution procedures under Part 5 of the Code must be followed to resolve the dispute notwithstanding clause 14.1(c).

15. No Waiver

Any time or other indulgence that the Merchant may grant to the Grower shall not affect the rights of the Merchant except to the extent that the Merchant expressly waives such term, or part thereof in writing.

16. Governing Law

This Agreement is governed by and is to be construed in accordance with the laws in force in the Relevant State. Each party submits to the non-exclusive jurisdiction of the courts of Relevant State.

17. Severance

If any provision of this Agreement shall be or be determined to be illegal, invalid, void or voidable the legality or validity of the remainder of this Agreement will not be affected and will continue in full force and effect.

18. Varying this Agreement

This Agreement can only be varied by agreement in writing between the Merchant and the Grower.

19. Terminating this Agreement

19.1 This Agreement may be terminated by the Merchant or the Grower by providing notice in writing to the other party (**Termination Notice**).

19.2 Any such termination:

(a) shall apply to prevent any despatch of Produce by the Grower under this Agreement after service of the Termination Notice but shall not apply to any Produce despatched by the Grower (whether delivered to the Merchant or not) before the service of the Termination Notice;

(b) shall apply to prevent any purchase of Produce by the Merchant under this Agreement after the service of the Termination Notice but shall not apply to any Produce purchased by the Merchant before the service of the Termination Notice; and

(c) will not affect any accrued rights or obligations of the Merchant or the Grower prior to the service of the Termination Notice.

19.3 Following termination, the Grower and the Merchant shall be entitled to pursue any other claim they may

have against the other which has accrued or arisen up to the date of termination.

19.4 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 by issuing a Termination Notice at any time within the cooling-off period, as set out in the Schedule, provided that such cooling-off period is not less than 7 days as set out in the Code.

19.5 Where this Agreement is terminated by either the Merchant or the Grower within the cooling-off period:

(a) clause 19.2 and clause 19.3 shall apply; and

(b) any payment of money or other valuable consideration, that was made for the purposes of, and directly related to, a purchase of Produce by the Merchant that would have occurred after the service of the Termination Notice (**Trade**), must be returned to the party who made the payment within 14 days of the service of the Termination Notice (less reasonable expenses incurred under this Agreement for the purpose of, and directly relating to the Trade).

20. Confidentiality

20.1 All terms of this Agreement shall remain confidential between the parties other than:

(a) the Purchase Price;

(b) any other matter which is in the public domain other than as a result of a breach of this Agreement.

20.2 A party may disclose any confidential terms of this Agreement to its professional advisers and its directors, officers, employees, servants and agents on a confidential basis.

21. Assignment

A party must not transfer, assign, novate, dispose of or encumber this Agreement or any right under this Agreement without the prior written consent of the other party.

22. Indemnity

22.1 The Grower agrees to indemnify the Merchant for any liability, loss or expense of any kind arising from or in respect of:

(a) the death of, or personal injury to, or disease suffered by, any person; and/or any damage to or loss of any property (or the use of that property), arising out of any negligent act or omission of the Grower; and

(b) any breach of this Agreement by the Grower,

other than to the extent the liability, loss or expense is caused or contributed to by a negligent act or omission of the Merchant.

23. Good faith

The Grower and the Merchant must perform its obligations under this Agreement in good faith and use all reasonable but commercially prudent endeavours in accordance with the Code.

24. Electronic signatures and Authorised Representatives

24.1 The parties consent to:

(a) information in connection with this Agreement being given by an electronic communication as defined in the *Electronic Transactions Act 1999* (Commonwealth) or the Relevant State Legislation (**ETA**); and

(b) an electronic signature being used to identify each party and to indicate each party's intention in relation to the information communicated (including an intention to be bound by this Agreement).

24.2 The parties acknowledge and agree that for the purposes of the Code and acceptance of the Terms of Trade and this Agreement including the Schedule (**Documents**), the Grower may acknowledge receipt of and accept the terms of the Documents by sending a text message to the number nominated by the Merchant in the Schedule.

24.3 The Grower warrants that the person executing this Agreement or any other documents related to or arising under this Agreement, including any Authorised Officer, has capacity to enter into such agreements and to bind the Grower under the same.

25. Notices

25.1 Any notice or other communication to or by any party must be:

(a) in writing and in the English language. For the avoidance of doubt, this includes "in writing" as that expression is defined in the ETA;

(b) addressed to the recipient outlined in the Schedule or to any other address as the recipient may have notified the sender; and

(c) be agreed to in writing by the party or by an Authorised Officer of the sender.

25.2 In addition to any other method of service authorised by law, the notice may be:

(a) personally served on a party;

(b) left at the party's current address for service;

(c) sent to the party's current address for service by prepaid ordinary mail or if the address is outside Australia by prepaid airmail;

(d) sent by facsimile to the party's current numbers for service; or

(e) sent by electronic transmission to the party's electronic mail address.

25.3 If a notice is sent or delivered in the manner provided in clause 25.2 it must be treated as given to or received by the addressee in the case of:

(a) delivery in person, when delivered;

(b) delivery by post:

(1) in Australia to an Australian address, the fourth Business Day after posting; or

(2) in any other case, on the tenth Business Day after posting;

(c) facsimile, when a transmission report has been printed by the sender's facsimile machine stating that the document has been sent to the recipient's facsimile number; or

(d) electronic transmission, when the sender's computer reports that the message has been delivered to the electronic mail address of the addressee,

but if delivery is made after 5.00pm on a Business Day it must be treated as received on the next Business Day in that place.

26. Definitions

In this agreement:

"**Additional Fees**" means additional fees to be charged by the Merchant to the Grower for Services provided as set out in Section B of the Schedule.

"**Agreed Price**" shall mean the Purchase Price of all or part of the Produce payable to the Grower by the Merchant as agreed in writing by the parties pursuant to this Agreement.

"**Agreement**" means this agreement and the Schedule.

"**Authorised Officer**" means, in relation to a corporation which is a party:

(a) an employee of the party whose title contains either of the words Director or Manager;

(b) a person performing the function of any of them;

(c) a solicitor acting on behalf of the party; or

(d) a person appointed by the party to act as an Authorised Officer for the purposes of this agreement and notified to the others.

"**Business Day**" means a day that is not a Saturday, Sunday, public holiday, or Markets Holiday, in the Relevant State.

"**Code**" means the Horticulture Code of Conduct contained in the *Competition and Consumer (Industry Codes - Horticulture) Regulations 2017* (Cth) as amended from time to time.

"**Commencement Date**" means the date of commencement of the Agreement as specified in Section A of the Schedule.

"**Complying Produce**" means any Produce supplied by the Grower to the Merchant which is not Non-Complying Produce.

"**Delivery**" occurs when Produce is received by the Merchant and accepted for the purpose of re-sale by the Merchant (regardless of the purpose for which the Produce is dispatched by the Grower) and, where applicable, once any Services provided by the Merchant have been completed, and for the avoidance of doubt:

(a) delivery for the purposes of this Agreement will not occur when the Merchant rejects the Produce prior to the Delivery (**Non-Delivery Event**); and

(b) where a Non-Delivery Event has occurred, delivery may subsequently occur, upon:

(1) the Merchant and Grower agreeing new terms and documenting any material changes to the existing Schedule in writing (as accepted by the Grower); and

(2) the Merchant voluntarily changing the nature of its possession of the Produce such that it is held for the sole purpose of re-sale by the Merchant, and

Deliver or **Delivered** has a corresponding meaning.

"**FreshSpecs Produce Specifications**" means produce specifications published by Fresh Markets Australia from time to time.

"**Fresh Markets Australia**" means the national organisation representing each of the six market chambers across Brisbane, Sydney, Melbourne, Adelaide, Perth and Newcastle.

"Goods and Services Tax" has the meaning given in the GST Law.

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

"**Gross Sale Price**" means the price for which the Merchant sells Produce to a third party or parties.

"**Grower**" means a person or entity that grows Produce for sale and for the purposes of this Agreement being the person or entity specified in Section A of the Schedule.

"**Inspection Certificate**" shall mean a report prepared by an independent authority or third party assessor who is qualified by experience and/or education to declare the Produce unfit for human consumption, unsuitable for sale or not meeting a particular specification or standard.

"**Including**" or similar expressions are not words of limitation.

"**Markets Holiday**" is a day on which the market, in the Relevant State is closed.

"**Merchant**" means the entity described on the first page of this Agreement or related persons deemed to be in association with the merchant.

"**National Measurement Act**" means the *National Measurement Act 1960* (Cth) and *National Trade Measurement Regulations 2009* (Cth) as amended from time to time.

"**Non-Complying Produce**" means Produce determined as non-complying produce under clause 9.1.

"**Payment Period**" means the number of Business Days after the end of the Week in which the Produce is Delivered as set out in the Schedule.

"**Produce**" means "horticulture produce" as defined in the Code and unless otherwise indicated by context a reference in this Agreement to produce means the produce of a Grower.

"**Produce Specification Requirements**" means any particular product specification that the Merchant requires in order for Produce to be accepted by it.

"**Purchase Price**" means the amount determined under clause 3.

"**Reporting Period"** means the reporting period for which the Merchant must report to the Grower as specified in the Schedule.

"**Relevant State**" means the state in which the Merchant's premises, to which the Grower despatches Produce are situated.

"**Relevant State Legislation**" means the following legislation that is applicable to the Relevant State:

(a) *Electronic Transactions(Queensland) Act 2001*;

(b) *Electronic Transactions Act 2000 (SA);*

(c) *Electronic Transactions (Victoria) Act 2000;*

(d) *Electronic Transactions Act 2000 No 8 (NSW);* and

(e) *Electronic Transactions Act 2011 (WA).*

"**Return**" has the meaning in clause 13.1.

"**Schedule**" means the schedule to this Agreement which details, amongst other things, the pricing, services and timeframes applicable between the Merchant and Grower for the purposes of this Agreement.

"**Service or Services**" means the service or services to be provided by the Merchant for the Grower in respect of the Produce as described in the Schedule or as may be agreed between the Merchant and Grower in writing from time to time which shall be provided pursuant to this Agreement.

"**Statement**" means the statement to be provided by the Merchant under clause 4.4.

"**Statement Period**" means the period in which a Statement for the Reporting Period must be given asspecified in the Schedule.

"**Terms of Trade**" means the Merchant terms of trade for the purposes of the Code setting out the general terms on which the Merchant will trade with growers in respect of Produce, as amended from time to time.

"**Week**" means the period Saturday to Friday inclusive.

27. Interpretation

The following rules of interpretation apply unless the context requires otherwise:

(a) if a term of this Agreement conflicts with the Code, the Code prevails;

(b) headings are for convenience only and do not affect interpretation;

(c) the singular includes the plural and the plural includes the singular;

(d) a gender includes all genders;

(e) where a word or phrase is defined its other grammatical forms have a corresponding meaning;

(f) a reference to a person includes a person, partnership, corporation, trust, association, joint venture, unincorporated body, government body, the party's executors, administrators, successors and permitted assigns or other entity includes any other of them;

(g) a reference to a clause or schedule is to a clause or schedule to this Agreement and a reference to this Agreement includes a schedule to this Agreement;

(h) a reference to any party to this Agreement or any other agreement or document includes the party's successors and assigns;

(i) a reference to a right or obligation of any two or more persons confers that right or imposes that obligation, as the case may be, jointly and severally;

(j) a reference to any agreement or document is to that agreement or document as amended, novated, supplemented, varied or replaced from time to time, where applicable, in accordance with this Agreement or that other agreement or document;

(k) a reference to any legislation or to any provision of any legislation any modification or re-enactment of it, any legislative provision substituted for it and all regulations and statutory instruments issued under it; and

(l) a reference to conduct includes, without limitation any omissions, statement or undertaking, whether or not in writing.