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HPA V1 - MERCHANT (AGREED PRICE ON DELIVERY) (18/10/07)

ROSS & CO FRUIT & VEGETABLES PTY LTD

ABN: 14 009 689 507

Trading as Produce Merchants

HORTICULTURE PRODUCE AGREEMENT

DEFINITIONS

In this Agreement—

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

"Business" means the entity described above or related Persons deemed to be in association with the Business.

"Business Day" means a day that is not a Saturday, Sunday or a designated holiday in the State in which the Business is located.

"Code" means the Horticulture Code of Conduct contained in the Trade Practices (Horticulture Code of Conduct) Regulations 2006 (Cth).

"Delivery" occurs when Produce is received by the Business in its capacity as a merchant (as that term is defined in the Code) for the purpose of re-sale by the Business (regardless of the purpose for which Produce is dispatched by the Supplier), and for the avoidance of doubt:

- a) delivery for the purposes of this Agreement will not occur when (**Non-Delivery Events**):
 - i) the Business rejects the Produce prior to Delivery; or
 - ii) the Produce is received by the Business (or a third party) as bailee under storage and warehousing arrangements; and
- b) where a Non-Delivery Event has occurred, delivery may subsequently occur, upon the Business voluntarily changing the nature of its possession of the Produce such that it is held, for the sole purpose of re-sale by the Business.

"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.

"Nursery Products" includes:

- a. trees, shrubs, plants, seeds, bulbs, corms and tubers (other than edible tubers);
- b. propagating material and plant tissue cultures, grown for ornamental purposes or for producing fruits, vegetables, nuts or cut flowers and foliage; and
- c. cut flowers and foliage.

"Person" shall include an incorporated body or other entity. If a party consists of more than one Person then this Agreement binds them jointly and each of them severally and includes the party's executors, administrators, successors and permitted assigns.

"Produce" means unprocessed:

- a. fruits;
- b. vegetables, including mushrooms and other eligible fungi;
- c. nuts;
- d. herbs;
- e. other edible plants;

but does not include nursery products.

"Purchase Price" means the amount determined under clause 8.

"Reporting Period" means the reporting period for the Statement specified in the Schedule;

"Return" has the meaning in clause 31.

"Supplier" means any producer or other Person who sends Produce to the Business in accordance with this Agreement.

"Statement" means the statement to be provided by the Business under clause 13.

"Week" means the period Saturday to Friday inclusive.

TERMS AND CONDITIONS

General

1. This Agreement (**Terms**) as described is effective from 14 May 2007 (**Commencement Date**) and shall apply to all transactions between the Business and the Supplier on or after the Commencement Date unless:
 - a. by specific written notice to the contrary; or
 - b. these Terms are replaced by another set of Terms at a later date; or
 - c. the transaction is not a transaction that would be covered by the Code.
2. The Business will purchase the Produce from the Supplier as a Merchant, for the purposes of the Code.

Transfer of Title and Risk

3. The parties acknowledge that despite the Delivery of the Produce under these Terms, title and risk in respect of the Produce shall only pass in accordance with clauses 4 and 5.
4. Despite anything else in these Terms, title to the Produce will only pass to the Business as follows:
 - a. if the Purchase Price of the Produce has been agreed to by the Business and Supplier before Delivery of the Produce to the Business – title to the Produce will pass on Delivery of the Produce to the Business; or
 - b. otherwise - title to the Produce will pass at the time that the Business and the Supplier agree on the Purchase Price for the Produce.
5. The Supplier covenants and warrants that:
 - a. they have all right, title and interest in and to the Produce;
 - b. title will pass to the Business clear of all encumbrances, claims and other adverse interests; and
 - c. the Supplier is the grower of the Produce.

6. The Business will assume risk in respect of the Produce once title to the Produce passes to the Business under clauses 4 and 5.
7. The Business shall not be obliged to keep insurances in respect of goods in their legal and physical control. If the Business does have insurance, the Business' insurer, the maximum amount of claims covered by the Business' insurance and the defined events covered by the insurance including fire, theft and accidental damage and other deterioration and/or inherent loss of any kind (**Insurance**), is set out in the Schedule. The Business will not be liable for loss or damage to the Produce arising from any cause or event outside of the control of the Business. If the details of Insurance in the Schedule are blank, the Business does not hold Insurance.

Price Determination

8. The Purchase Price for Produce shall be determined as an Agreed Price for the specific Produce:
 - a. at the farm gate;
 - b. prior to Delivery of the Produce to the business;
 - c. immediately upon Delivery of the Produce to the Business.

[Strike out the inapplicable options – If no clause is struck out, clause 8(c) will apply]
9. The Agreed Price must be agreed by the Business and the Supplier in writing. Where an Agreed Price cannot be agreed, clause 26 shall apply.

Limit on Claims

10. The Business shall not be liable in respect of any claim by the Supplier unless such claim is received in writing within the number of Business Days, as advised in the Schedule to these Terms, from the issue by the Business of the Statement in respect of the relevant Produce.

Business Payments and Reporting Obligations

11. The Business agrees to make payments to the Supplier in the following manner –
 - a. Payment will be made no later than the number of Business Days, as advised in the Schedule to these Terms, from the end of the Week during which the relevant Produce is received by the Supplier.
 - b. Such payments shall be by cheque or direct bank deposit to the credit of the Supplier as specified in writing by the Supplier.
 - c. The Business may set off against any amount owing by the Business to the Supplier against any amount due for payment (including under any indemnity or reimbursement obligation) by the Supplier to the Business under these Terms or any other agreement (including any service agreement between the parties not covered by the Code).
12. The Business is authorised to deduct charges from payments to the Supplier for-
 - a. Any payments made on behalf of the Supplier where the Business has agreed to make such payments (eg. transport/unloading/packaging);
 - b. Levies and fees for service payable under State or Commonwealth legislation or any voluntary arrangement;
 - c. Goods and Service Tax in respect of any item for which a Tax Invoice has been issued. The Business will not charge the Supplier a fee, commission or other amount for services performed by the Business, other than as set out in these Terms.
13. The Business will provide a statement to the Supplier containing the following details, covering the Reporting Period (**Statement**)–
 - a. Supplier's reference or shipping note number;
 - b. Description of the quality of Produce purchased;
 - c. Details of the quantity of Produce purchased;
 - d. The date or dates of the purchases of Produce
 - e. The Purchase Price for the Produce;
 - f. The time at which the produce was Delivered to the Business;
 - g. Details of any non-complying Produce that is disposed of, or otherwise dealt with, in accordance with clauses 23, 24, 25, 26 and 27 of these Terms;
 - h. A copy of any relevant Inspection Certificate obtained in accordance with clause 25.d.ii of these Terms;

The Statement must be given to the Supplier within such number of days following the end of the relevant Reporting Period as identified in the Schedule.
14. The Business will issue a Tax Invoice to the Supplier in respect of any item for which Goods and Services Tax is chargeable.
15. The Business may, in its sole and absolute discretion, provide the Supplier with a marketing bonus at an amount and at such times as determined by the Business in its discretion, having regard to the following factors:
 - a. the relationship of the Supplier to the Business, including the Supplier's loyalty in dealings with the Business;
 - b. the level of compliance by the Supplier with these Terms in relation to specific Produce or generally;
 - c. the quality and presentation of Produce delivered to the Business under these terms including the presentation and packing of such Products; and
 - d. whether, in view of one or more of the factors listed in paragraph a. to c. above, the Business has been able to secure a sale price to a third party over and above its expectations.

Supplier Obligations

16. The Supplier agrees to provide documentation that is suitable to the Business that accurately describes the quantity, variety, size, class, description and characteristics of the Produce, including containers, prior to delivery to the Business

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17. The Supplier warrants that:
- the Produce dispatched to the Business is fit for human consumption and complies with any statutory regulations including food safety, packaging and/or labelling; and
 - it has complied with the Trade Measurement Act 1990 (Qld) with respect to the Produce.
18. The Supplier warrants that the Produce dispatched to the Business is fit for its purpose and:
- in every case - is packed or presented and complies with the written product specifications including quality and shelf life (**Delivery Requirements**) provided by the Business to the Supplier from time to time prior to the Purchase Price being set with respect to the Produce or as are otherwise agreed to in writing between the Business and the Supplier (**Business Requirements**); and
 - where there are no relevant Business Requirements or the Market Produce Specifications – FreshSpecs standards that may be published by the Australian Chamber of Fruit and Vegetable Industries from time to time (Chamber Requirements) are not inconsistent with the Business Requirements – complies with the Chamber Requirements, (Product Specifications).
19. The Supplier must not dispatch Produce to the Business that:
- does not comply with the Product Specifications; or
 - has not been solicited by the Business.
20. The Supplier agrees to implement and maintain an industry recognised HACCP based food safety and quality system that is subject to an annual third party audit. Copies of any current certification must be sent to the Business.
21. The Supplier agrees to supply details of their registered Australian Business Number (ABN) prior to any payment being made by the Business.

Complying and Non-Complying Produce

22. The Supplier must ensure that Produce supplied to the Business complies with clauses 5, 16, 17 and 18 or that Produce will be treated as non-complying Produce.

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

23. Where these Terms provide 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 immediately upon Delivery occurring, then the Business shall be entitled prior to or immediately upon Delivery occurring to elect (the day the election is made being the **Non-Compliance Day**) to:
- reject all of the Produce;
 - accept all of the Produce; or
 - accept part of the Produce and reject the balance of the Produce.
24. Where the Business elects to accept all or part of the Produce under clause 23 or clause 28, or fails to give a notice under clause 25 to reject all or part of the Produce or claim a Credit for Produce under clause 28 (Accepted Produce), then these Terms generally shall apply to require the Business to purchase the Accepted Produce for the Purchase Price relevant to that Accepted Produce.
25. Where the Business elects to reject all or part of the Produce (the Rejected Produce) under clause 23, then subject only to Clause 25d:
- the Business shall be deemed not to accept the Rejected Produce, and the Supplier shall retain title and risk in and to the Rejected Produce;
 - The Supplier is not entitled to the Purchase Price with respect to the Rejected Produce;
 - the Business will immediately advise the Supplier by telephone, fax, e-mail or other electronic means of the rejection;
 - within TWO (2) Business Days of the Non-Compliance Day, the Business will advise the Supplier in writing of the rejection and the reasons for such rejection and request that the Supplier advise as to whether the Supplier:
 - wishes to retake possession of the Produce; or
 - requires an independent inspection and assessment of the condition of the Produce to determine whether an Inspection Certificate should be issued at the Supplier's cost; or
 - wishes to make other arrangements for the storage or warehousing of the Produce, sale or resale of the Produce or its removal from the Business premises.
26. Despite anything else in these Terms, the Business may elect to destroy and dispose of the Produce, or deliver the Produce to the Supplier if:
- the Supplier does not respond within TWENTY FOUR (24) hours of notification in accordance with Clause 25.d;
 - the Supplier fails to retake possession of the Produce within FIVE (5) Business Days of the Supplier indicating an intention to do so under clause 25.d;
 - no agreement on the Purchase Price has been reached between the Supplier and the Business within a reasonable period following Delivery, provided that the Business must use reasonable endeavours to contact the Supplier to negotiate a Purchase Price and must act reasonably in exercising its rights under this clause 26c.
- The Supplier authorises and confirms by virtue of entry into these terms, such action by the Business.
27. Where clause 26 applies any destruction, disposal and/or delivery of Produce is at the Supplier's expense.

Effect of Produce being Non-Complying Produce – After Purchase

28. Subject to clause 23, where these Terms provide Produce is to be treated as Non-Complying Produce and the Produce has been purchased by the Business, then the business shall be entitled within two (2) Business Days of the Produce being treated as Non-Complying Produce under these Terms to elect (the day the election is made being the Non-Compliance Day) to:
- claim a credit for the Produce under clause 29;
 - not claim a credit for the Produce under clause 29; or
 - claim a credit for part of the Produce.
29. Where the Business elects to claim a credit for all or part of the Produce under clause 28, then:
- the Business will immediately advise the Supplier by telephone, fax, email or any other electronic means of the claim for credit;
 - within two (2) Business Days of the Non-Compliance Day, the Business will advise the Supplier in writing of the claim for credit and the reasons for such claim for credit; and
 - where there has been a Return the Business is entitled at their discretion to deduct up to a maximum of the sale price of the Produce (agreed between the Business and a third party in respect of the Produce) (after allowing for any proceeds of any sale of such Produce retained by the Business including the proceeds of any subsequent sale to a third party of such Produce) from the amounts payable by the Business to the Supplier under clause 11.
30. The Supplier acknowledges that any amount deducted under clause 29 represents a genuine pre-estimate of the Business' loss as a result of the Produce being Non-Complying Produce.

Returns of Produce

31. The Supplier agrees that any claims for credit which result following the sale of the Produce by the Business to a third party, which claims are accepted by the Business (**Return**), due to the Produce not complying with clause 5, 17 or 18, may be dealt with under clause 28.
32. Produce returned under clause 31 will be treated as non-complying Produce and subject to clauses 13, 28 and 29 of these Terms.

Dispute Resolution

33. In the case of a dispute that may arise under these Terms:
- the person that the Business should contact in that event, on behalf of the Supplier (**Supplier's Contact**) is set out in the Schedule;
 - the person that the Supplier should contact in that event, on behalf of the Business (**Business' Contact**) is set out in the Schedule;
 - the Business and the Supplier shall use the following to resolve the dispute;
 - if required by the Business - the Business' own Internal Dispute Resolution Procedure; and/or
 - the Brisbane Produce Market Dispute Resolution Procedure; and/or
 - the dispute resolution procedures under the Code.
 - In the case of a dispute relating to quality, the Market Produce Specifications – FreshSpecs standards will apply as the benchmark standard for all Class 1 Produce.

No Waiver

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

Governing Law

35. These Terms are governed by and are to be construed in accordance with the laws in force in the State of (insert State of Business's address). Each party submits to the non-exclusive jurisdiction of the courts of (insert state of Business's address).

Severance

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

Varying these Terms

37. These Terms can only be varied by agreement in writing between the Business and the Supplier.

Terminating these Terms

38. These Terms may be terminated by the Business or the Supplier by providing notice in writing to the other party (Termination Notice).
39. Any such termination:
- except where clause 41 applies - Shall apply prospectively to prevent any despatch of Produce by the Supplier under these Terms after the Termination Notice but shall not apply to any Produce despatched by the Supplier (whether delivered to the Business or not) before the Termination Notice; and
 - where clause 41 applies - Shall apply prospectively to prevent any purchase of Produce by the Business under these Terms after the Termination Notice but shall not apply to any Produce purchased by the Business before the Termination Notice; and
 - will not affect any accrued rights or obligations of the Business or the Supplier prior to the Termination Notice.
40. Following termination, the Supplier and the Business shall be entitled to pursue any other claim they may have against the other which have accrued or arisen up to the date of termination.
41. Despite anything else in these Terms, these Terms may be terminated by either the Business or the Supplier within the cooling-off period under the Code, and in such event:
- clause 39 and clause 40 shall apply; and
 - 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 Business that would have occurred after the Termination Notice (**Trade**), must be returned to the party who made the payment within 14 days of the Termination Notice (less reasonable expenses incurred under these Terms for the purpose of, and directly relating to the Trade).