



# PERFECTION FRESH AUSTRALIA PTY LIMITED

## TERMS OF TRADE - MERCHANT

### DEFINITIONS

In these terms of trade –

“**Acceptance**” by the Merchant means the later of:

- (i) the time at which any Produce in the possession of the Merchant is, in the opinion of the Merchant, ready and available for Sale; and
- (ii) the time at which the Merchant and the Grower agree upon a price in writing.

“**Agreed Price**” means the purchase price of all or part of the Produce payable to the Grower by the Merchant, as agreed from time to time in writing by the parties pursuant to the Terms prior to the sale of the Produce by the Merchant, or absent such agreement, means the Sale Proceeds less an amount not exceeding 20 per cent.

“**Authorised Delivery Address**” means an address within Australia at which the Merchant operates or an address of a Customer of the Merchant, as directed from time to time by the Merchant.

“**Business Day**” means a day (from Monday to Friday) when banks are open for trading where the Merchant has its head office.

“**Code of Conduct**” means the Horticultural Code of Conduct contained within the *Competition and Consumer (Industry Codes – Horticulture) Regulations 2017* (Cth).

“**Customer**” means a third party purchaser of Produce from the Merchant.

“**Default Event**” means where a Delivery of Produce does not meet the Minimum Quality Specifications and is Rejected by the Merchant or Returned by a Customer of the Merchant.

“**Delivery**” is effected immediately upon Acceptance of the Produce by the Merchant; or for a Delivery made directly to a Customer by the Grower, immediately upon Acceptance of the Produce by that Customer.

“**Effective Date**” means 1 August 2017.

“**Expenses**” means those amounts and items referred to in clause 15.

“**Grower**” means a person who grows their own horticultural produce for sale.

“**GST**” means Goods and Services Tax.

“**Inspection Certificate**” means a report prepared by a qualified quality officer, by experience and/or education, of the Merchant or a Customer, able to declare the Produce unfit for human consumption, unsuitable for sale or not meeting the Minimum Quality Specifications.

“**Independent Inspection Certificate**” means 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 the Minimum Quality Specifications.

“**Including**” or similar expressions are not words of limitation.

“**Merchant**” means Perfection Fresh Australia Pty Ltd ACN 127 389 682 or related Persons deemed to be in association with the Merchant. The Merchant is a “trader” for the purposes of the Code of Conduct.

“**Minimum Quality Specifications**” means those quality specifications, as updated from time to time, of the Produce and set by the Merchant to satisfy customer requirements. In this respect the Merchant warrants that such Minimum Quality Specifications will not be any more stringent than industry standard specifications (where available) as defined at the website [www.freshmarkets.com.au](http://www.freshmarkets.com.au) in the Fresh Specs Produce Specifications (“Freshspecs”). Unless otherwise supplied by the Merchant to the Grower, the Minimum Quality Specifications for Produce will be Freshspecs.

“**Payment Date**” means no later than the number of Business Days specified as the Payment Date from the end of the Week during which the Produce was delivered to an Authorised Delivery Address of the Merchant. If no date is specified the relevant payment period is to be no later than twenty (20) Business Days from the date of the Sale.

“**Person**” shall include an incorporated body or other entity. If a party consists of more than one Person than these Terms bind them jointly and each of them severally and includes the party’s executors, administrators successors and permitted assigns.

“**Produce**” shall have the same meaning as “horticulture produce” as defined in the Code of Conduct and can be supplied in retail ready packaging or in bulk packaging as required by the Merchant from time to time.

“**Produce Characteristics**” means details of any issues or characteristics relating to the Produce which may impact upon the shelf life or sale price and includes a statement as to the quality (or designated “class”) of the Produce, whether the Produce has been stored prior to delivery, dipped or has been subjected to a level of rain or excessively dry conditions which may be reasonably likely to impact upon the quality or shelf life of the Produce.

“**Sale**” means a sale of Produce by the Merchant to a Customer.

“**Saleable**” means Produce that does not meet the Minimum Quality Specifications but is fit for human consumption and able to be sold on the market at a price representative of the quality of the Produce.

“**Sale Proceeds**” means the net proceeds of a Sale payable to the Merchant by a Customer.

“**Week**” means the period from Saturday to Friday inclusive.

Any requirement which must be done on a specified day which is not a Business Day then such act must be done on the next Business Day.

### TERMS & CONDITIONS

#### General

1. These Terms of Trade as described are effective from the Effective Date unless and until these Terms are replaced by another document (the “**Terms**”) and shall apply to all Produce Delivered or to be delivered to an Authorised Delivery Address by or on behalf of the Grower during its currency. These Terms comprise the Merchant Terms of Trade for the purposes of the Code of Conduct and set out the general terms upon which the Merchant will trade with growers in respect of horticultural produce. Under these Terms the Merchant acts as “Merchant” for the purposes of the Code of Conduct and is only prepared to act as such. Additional and specific terms between the Merchant and growers are set out in the Merchant’s Horticulture Produce Agreement (“**HPA**”). While these Terms set out the Merchant’s general terms of trade, the Code of Conduct requires transactions between a Grower and Merchant (as defined thereunder) to be conducted under an HPA. In the event of any inconsistency between these Terms and the HPA the HPA prevails to the extent of the inconsistency.
2. The Merchant will purchase the Produce from the Grower subject to these Terms and resell, dispose of, or otherwise deal with the Produce at the Merchant’s discretion to the exclusion of the Grower provided that the Produce meets the Minimum Quality Specifications upon Delivery.
3. **Supply of Produce**  
Prior to dispatch the Grower must notify the Merchant in writing of the type, quantity, Produce Characteristics and expected delivery



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date of the Produce to be delivered from time to time (the “Supply Notice”).

4. The Grower agrees to provide documentation with Delivery that accurately describes the quantity, variety, size, class, description and characteristics of the Produce.

5. The costs of Delivery of Produce to the Merchant shall be borne by the Grower unless otherwise agreed to in writing by the Merchant.

### 6. Rejection of Produce

If:

- (a) the Grower does not provide the Supply Notice prior to Delivery of Produce; or
- (b) an Inspection Certificate declares that the Produce delivered does not accord with the type, quantity, Produce characteristics or other description of the Produce set out in the Supply Notice or the relevant Produce’s packaging or delivery documentation or that the Produce is unfit for human consumption, unsuitable for sale or not meeting the Minimum Quality Specifications; or
- (c) an Independent Inspection Certificate declares that the Produce is unfit for human consumption, unsuitable for sale or not meeting the Minimum Quality Specifications;

Then, the Merchant is entitled to reject all or part of the Produce delivered by notice in writing to the Grower within two (2) Business Days of the Delivery (the “Rejection Notice”). The Merchant agrees to notify the Grower by phone or email of a rejection of produce immediately upon such rejection becoming known by the Merchant.

7. If the Merchant does not give the Rejection Notice, or issues a Rejection Notice over part only of the delivered Produce, then the Merchant shall be deemed to have accepted delivery of the Produce or part of the Produce (as the case may be) at the Agreed Price.

8. Where a Rejection Notice has been provided the Grower may elect by written notice (the “Direction”) to the Merchant to:

- (a) have all or part of the Produce destroyed at the Grower’s cost; or
- (b) have the Produce re-delivered to the Grower at the Grower’s cost; or
- (c) provided that the Produce is Saleable, direct the Merchant to sell the Produce on an agency basis whereupon the subject Produce will be sold by the Merchant pursuant to the Terms of Trade – Agent of the Merchant.

9. Upon the issuing of a Rejection Notice, the Merchant shall be entitled to recover from the Grower any Expenses incurred in respect to the Produce.

10. If the Grower does not give the Direction within twenty-four (24) hours of provision of the Rejection Notice, then subject to clause 11, the Grower shall be deemed to have elected to destroy the entire Produce at its sole cost.

11. The Grower agrees that if an Independent Inspection Certificate declares the Produce unfit for human consumption, then the Merchant will not, in any circumstances, attempt to sell the Produce, however if the Produce is Saleable, the Grower agrees that in the event that the Direction is not given to the Merchant, the Merchant is authorised and directed to sell the Produce in accordance with clause 8(c).

### Merchant Obligations – Price & Payment

12. The purchase price for Produce (“Purchase Price”) shall be the Agreed Price with such agreement reached at the farm gate or immediately upon Delivery of the Produce to the Merchant.
13. If a Default Event occurs, the Grower agrees that the Agreed Price for the Produce is voided, the Purchase Price is not payable by the Merchant and the provisions of clauses 6-11 will apply.
14. The Merchant will confirm the description, quantity and quality of the Produce purchased with the Grower within five (5) Business Days of Delivery of the Produce where the Merchant has established an Agreed Price to purchase the Produce from the Grower and a Default Event has not occurred.
15. The Merchant shall pay the Purchase Price to the Grower on the Payment Date after deducting the following amounts:
  - (a) any authorised deductions including levies and fees for service payable under State or Commonwealth legislation or under any other agreed arrangement between the Grower and the Merchant; and
  - (b) GST in respect of any item for which a Tax Invoice has been issued (if applicable).
  - (c) any pre-agreed promotional levies as determined by the Merchant and acknowledged in writing by the Grower from time to time.
16. All payments to the Grower shall at the discretion of the Merchant be by cheque or direct bank deposit to the credit of the Grower as specified in writing by the Grower.
17. The Merchant reserves the right to withdraw from making payments on behalf of the Grower or to charge a fee for service in respect of such payments.
18. At the same time as the Merchant makes the payment in accordance with clause 15, the Merchant will provide the following details to the Grower:
  - (a) date of purchase of the Produce;
  - (b) description of the Produce purchased;
  - (c) details of the quantity purchased;
  - (d) Details of any quantity rejected by the Merchant including reasons for such rejection;
  - (e) a copy of any relevant Inspection Certificate or Independent Inspection Certificate in respect of the Produce;
  - (f) details of all charges deducted from the Grower under clause 15 of these Terms.

### Title & Risk

19. The parties acknowledge that title and risk in respect of the Produce shall pass upon Delivery of the Produce and once an Agreed Price has been determined.
20. The Grower covenants that title to the Produce will pass to the Merchant clear of all encumbrances, claims and other adverse interests.
21. The Merchant will assume risk in respect of the Produce once title to the Produce passes to the Merchant under clause 19.
22. The Grower must insure the Produce pending the passing of title to the Merchant for the Produce’s full insurable value and shall during such times exercise or cause other relevant persons to exercise reasonable care in dealings with the Produce.
23. The Grower acknowledges and agrees that title and risk in respect to the Sale Proceeds shall always be and remain with the Merchant to the exclusion of the Grower.

### Miscellaneous

24. The Merchant shall keep insurances in respect of goods in their legal and physical control for defined events including fire, theft



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- and accidental damage other than deterioration and/or inherent loss of any kind. Until Delivery, 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. The Merchant's insurers are Liberty International Underwriters (marine transit insurance) and Affiliated FM (industrial special risks insurance). The maximum amount of claims covered by these insurances is \$1,000,000 and \$50,000,000 respectively.
25. The Merchant shall not be liable in respect of any claim by the Grower unless such Claim is received in writing within seven (7) days from the date the Merchant gives notice under clause 18.
  26. In the event of a dispute, either party may invoke the dispute resolution procedure under the Code of Conduct, provided however that nothing in these terms prevent a party seeking urgent interlocutory relief from a Court.
  28. The Merchant will issue a Tax Invoice to the Grower in respect of any item for which GST is chargeable.
  29. The Merchant will not be liable for any consequential loss to the Grower or any other Person howsoever caused.
  30. The Grower guarantees that the Produce delivered to the Merchant is fit for human consumption and complies with all statutory regulations concerning food safety, product quality, packaging and/or labeling.
  31. The Grower guarantees that the Produce delivered to the Merchant is fit for purpose and complies with the Minimum Quality Specifications.
  32. The Grower agrees that it will implement and maintain GFSI (Global Food Safety Initiative) recognized food safety and quality system as well as HARPS that is subject to an annual third party audit. Copies of any current certification must be sent to the Merchant.
  33. The Grower acknowledges and agrees that the Customer is a Customer of the Merchant and such customer names and lists are and will remain the property of the Merchant to the exclusion of the Grower. Notwithstanding this, the Grower agrees that for business efficacy and in order to maximize the Agreed Price offered to the Grower, the Merchant will from time to time require that the Grower deliver Produce directly to a Customer of the Merchant. The Grower agrees not to solicit (or attempt to solicit) sales with a Customer of the Merchant to the exclusion of the Merchant.
  34. The Grower indemnifies the Merchant against any liability, loss, expense or demand from or arising from any false, misleading, deceptive or misdescriptive representation or statement made by the Grower in respect of the Produce.
  35. Despite anything else in these Terms, the Grower acknowledges that the Merchant has certain exclusive rights over fresh produce and that nothing in these Terms or any conduct or custom between the parties will operate to adversely affect any such right whether proprietary or otherwise.
  36. NOT USED
  37. The Grower agrees to supply details of their registered Australian Business Number (ABN) prior to any payment being made by the Merchant.
  38. These Terms are governed by and are construed in accordance with the laws in force in the State of New South Wales and each party submits to the non exclusive jurisdiction of the Courts in that State.
39. The parties must keep all of the Confidential Information obtained from the other party strictly confidential.  
"Confidential Information" means all information disclosed (whether orally, in writing or in any other form) by one party to the other which is identified as being confidential or is by its nature confidential which is not in the public domain (otherwise than as a result of a breach of these Terms).
  40. **Interstate Certification Assurance and Social Accountability**
    - (a) The supply of the Product will be made to customers of Merchant throughout Australia. In order to supply the Product into different States, Interstate Certification Assurance (ICA) is required by law. In this regard the Grower agrees to do all things necessary to obtain ICA accreditation. The Merchant will assist the Grower in obtaining such accreditation if requested to do so by the Grower.
    - (b) The Grower agrees with the Merchant that the Grower is taking all steps in its business to protect the environment fundamental human rights and values in the workplace. This includes business policies to ensure;
      - the strict compliance with applicable Federal and State laws;
      - a safe and clean workplace;
      - fair terms of employment with no discrimination or forced labour;
      - no underage workers;
      - no physical punishment;
      - freedom of association; and
      - protection of the environment as per Federal, State and Local Environment Laws and Regulations

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