

Fresh Produce Group of Australia Pty Ltd - Terms & Conditions of Trade

1. Definitions

- 1.1 "Seller" shall mean Fresh Produce Group of Australia Pty Ltd (ABN 87 055 359 601) its successors and assigns or any person acting on behalf of and with the authority of Fresh Produce Group of Australia Pty Ltd.
- 1.2 "Buyer" shall mean the Buyer (or any person acting on behalf of and with the authority of the Buyer) as described on any quotation, work authorisation or other form as provided by the Seller to the Buyer.
- 1.3 "Guarantor" means that person (or persons), or entity, who agrees to be liable for the debts of the Buyer on a principal debtor basis.
- 1.4 "Goods" shall mean Goods supplied by the Seller to the Buyer (and where the context so permits shall include any supply of Services as hereinafter defined) and are as described on the invoices, quotation, work authorisation or any other forms as provided by the Seller to the Buyer.
- 1.5 "Services" shall mean all Services supplied by the Seller to the Buyer and includes any advice or recommendations (and where the context so permits shall include any supply of Goods as defined above).
- 1.6 "Price" shall mean the price payable for the Goods as agreed between the Seller and the Buyer in accordance with clause 4 of this contract.

2. The Commonwealth Trade Practices Act 1974 ("TPA") and Fair Trading Acts ("FTA")

- 2.1 Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the TPA or the FTA in each of the States and Territories of Australia, except to the extent permitted by those Acts where applicable.

3. Acceptance

- 3.1 Any instructions received by the Seller from the Buyer for the supply of Goods and/or the Buyer's acceptance of Goods supplied by the Seller shall constitute acceptance of the terms and conditions contained herein.
- 3.2 Where more than one Buyer has entered into this agreement, the Buyers shall be jointly and severally liable for all payments of the Price.
- 3.3 Upon acceptance of these terms and conditions by the Buyer the terms and conditions are binding and can only be amended with the written consent of the Seller.
- 3.4 The Buyer shall give the Seller not less than fourteen (14) days prior written notice of any proposed change of ownership of the Buyer or any change in the Buyer's name and/or any other change in the Buyer's details (including but not limited to, changes in the Buyer's address, facsimile number, or business practice). The Buyer shall be liable for any loss incurred by the Seller as a result of the Buyer's failure to comply with this clause.

4. Price And Payment

- 4.1 At the Seller's sole discretion the Price shall be either:
 - (a) as indicated on invoice(s) provided by the Seller to the Buyer in respect of Goods supplied; or
 - (b) the Seller's quoted Price (subject to clause 4.2) which shall be binding upon the Seller provided that the Buyer shall accept the Seller's quotation in writing within thirty (30) days.
- 4.2 The Seller reserves the right to change the Price in the event of a variation to the Seller's quotation.
- 4.3 The Seller may submit a detailed payment claim at intervals of not less than one month for work performed up to the end of each month. The value of work so performed shall include the reasonable value of authorised variations, whether or not the value of such variations has been finally agreed between the parties, and the value of materials delivered to the site but not installed.
- 4.4 At the Seller's sole discretion a deposit may be required.
- 4.5 At the Seller's sole discretion:
 - (a) payment shall be due on delivery of the Goods; or
 - (b) payment shall be due before delivery of the Goods; or
 - (c) payment for approved Buyers shall be made by instalments in accordance with the Seller's payment schedule; or
 - (d) payment for approved Buyers shall be as agreed and approved on the Buyer's account application
- 4.6 Time for payment for the Goods shall be of the essence and may be stated on the invoice or any other forms. If no time is stated then payment shall be due fourteen (14) days following the date of the invoice.
- 4.7 Payment will be made by cheque, or by bank cheque, or by direct credit, or by any other method as agreed to between the Buyer and the Seller.
- 4.8 GST and other taxes and duties that may be applicable shall be added to the Price except when they are expressly included in the Price.

5. Delivery Of Goods

- 5.1 At the Seller's sole discretion delivery of the Goods shall take place when
 - (a) the Buyer takes possession of the Goods at the Buyer's nominated address (in the event that the Goods are delivered by the Seller or the Seller's nominated carrier) or
 - (b) if the Buyer collects the Goods from the Seller's nominated premises then at the point the Goods are loaded on the conveying vehicle at the Seller's premises or elsewhere
- 5.2 Unless the costs of delivery are specifically included in the Price in the relevant invoice or quote, such costs shall be charged in addition to the Price and will be payable by the Buyer.
- 5.3 The Buyer shall make all arrangements necessary to take delivery of the Goods whenever they are tendered for delivery. In the event that the Buyer is unable to take delivery of the Goods as arranged then the Seller shall be entitled to charge a reasonable fee for delivery and storage.
- 5.4 Delivery of the Goods to a third party nominated by the Buyer is deemed to be delivery to the Buyer for the purposes of this agreement.
- 5.5 The Seller may deliver the Goods by separate instalments. Each separate instalment shall be invoiced and paid in accordance with the provisions in these terms and conditions.
- 5.6 The failure of the Seller to deliver the Goods shall not entitle either party to treat this contract as repudiated.
- 5.7 The Seller shall not be liable for any loss or damage whatsoever due to failure by the Seller to deliver the Goods (or any of them) promptly or at all due to circumstances beyond the control of the Seller.

6. Title

- 6.1 The Seller and Buyer agrees that ownership of the Goods shall not pass until:
 - (a) the Buyer has paid the Seller all amounts owing for the particular Goods; and
 - (b) the Buyer has met all other obligations due by the Buyer to the Seller in respect of all contracts between the Seller and the Buyer.
- 6.2 Receipt by the Seller of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised and until then the Seller's ownership or rights in respect of the Goods shall continue.
- 6.3 It is further agreed that:
 - (a) where practicable the Goods shall be kept separate and identifiable until the Seller shall have received payment and all other obligations of the Buyer are met; and
 - (b) until such time as ownership of the Goods shall pass from the Seller to the Buyer the Seller may give notice in writing to the Buyer to return the Goods or any part of them to the Seller. Upon such notice the rights of the Buyer to obtain ownership or any other interest in the Goods shall cease; and
 - (c) the Seller shall have the right of stopping the Goods in transit whether or not delivery has been made; and

- (d) if the Buyer fails to return the Goods to the Seller then the Seller or the Seller's agent may enter upon and into land and premises owned, occupied or used by the Buyer, or any premises as the invitee of the Buyer, where the Goods are situated and take possession of the Goods; and
- (e) the Buyer is only a bailee of the Goods and until such time as the Seller has received payment in full for the Goods then the Buyer shall hold any proceeds from the sale or disposal of the Goods, up to and including the amount the Buyer owes to the seller for the Goods, on trust for the Seller; and
- (f) the Seller can issue proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods may not have passed to the Buyer; and
- (g) until such time that ownership in the Goods passes to the Buyer, if the Goods are converted into other products, the parties agree that the seller will be the owner of the end products.

7. Risk

- 7.1 If the Seller retains ownership of the Goods nonetheless, all risk for the Goods passes to the Buyer on delivery.
- 7.2 If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Buyer, the Seller is entitled to receive full payment for the Goods and, where full payment is not received by the Seller, all insurance proceeds payable in respect of the Goods. The production of these terms and conditions by the Seller is sufficient evidence of the Seller's rights to receive the insurance proceeds without the need for any person dealing with the Seller to make further enquiries.

8. Defects

- 8.1 The Buyer shall inspect the Goods on delivery and shall within twenty four (24) hours of delivery (time being of the essence) notify the Seller of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Buyer shall afford the seller an opportunity to inspect the Goods within a reasonable time following delivery if the Buyer believes the Goods are defective in any way. If the Buyer shall fail to comply with these provisions the Goods shall be presumed to be free from any defect or damage. For defective Goods, which the Seller has agreed in writing that the Buyer is entitled to reject, the Seller's liability is limited to either (at the Seller's discretion) replacing the Goods or repairing the Goods except where the Buyer has acquired Goods as a consumer with the meaning of the Trade Practices Act 1974 (Cwlth) or the Fair Trading Acts of the relevant state or territories of Australia, and is therefore also entitled to, at the consumer's discretion either repair of the Goods, or replacement of the Goods.

9. Returns

- 9.1 Returns will only be accepted provided that:
 - (a) the Buyer has complied with the provisions of Clause 8.1; and
 - (b) the Seller has agreed in writing to accept the return of the Goods; and
 - (c) the Seller will not be liable for Goods which have not been stored or used in a proper manner; and
 - (d) the Goods are returned in the condition in which they were delivered and with all packaging material in as new condition as is reasonably possible in the circumstances.
- 9.2 The Seller (at its sole discretion) may accept the return of Goods for credit in favour of the Buyer.

10. Warranty

- 10.1 The conditions applicable to the warranty given by the clause 10.1 are:
 - (a) the warranty shall not cover any defect or damage which may be caused or partly caused by or arise through:
 - (i) failure on the part of the Buyer to properly maintain, transit or store any Goods; or
 - (ii) failure on the part of the Buyer to follow any instructions or guidelines provided by the Seller; or
 - (iii) any use of any Goods otherwise than for any applicable specified on a quote or order form; or
 - (iv) the continued use of any Goods after any defect becomes apparent or would have become apparent to a reasonably prudent operator or user; or
 - (v) fair wear and tear, any accident or act of God.
 - (b) the warranty shall cease and the Seller shall thereafter in no circumstances be liable under the terms of the warranty if the Goods are treated, repacked or altered without the Seller's prior written consent.
 - (c) in respect of all claims the seller shall not be liable to compensate the Buyer for any delay in either replacing or remedying the Goods or in properly assessing the Buyer's claim.
- 10.2 For Goods not manufactured or grown by the Seller, the warranty shall be the current warranty provided by the manufacturer or grower of the Goods. The Seller shall not be bound by nor be responsible for any term, condition, representation or warranty other than that which is given by the manufacturer or grower of the Goods.

11. Storage and other Services Provided by Seller

- 11.1 Where the Seller provides storage, ripening, repacking or other Services to the Buyer, the Buyer provides the following warranties to the Seller in respect of any of the Buyer's Goods that enter the premises of the Seller:
 - (a) the Buyer's Goods are not contaminated in any way;
 - (b) the Buyer's Goods are not infested with any pest or disease;
 - (c) the Buyer has complied with all of the requirements of AQIS in respect of the Buyer's Goods;
 - (d) the documentation which accompanies the Buyer's Goods is true, accurate and complete in all material respects and may be relied upon by the Seller; and
 - (e) the specifications for the Buyer's Goods are true accurate and complete in all material respects.
- 11.2 The Buyer indemnifies the Seller for any loss or damages suffered by the Seller as a result of a breach of any one or more of the warranties given to it by the Buyer. For the avoidance of doubt "loss" suffered by the Seller may include loss of profit or anticipated profit, loss of revenue, loss of goodwill and loss arising from business interruption.
- 11.3 The Buyer releases the Seller from and agrees that the Seller will not be liable for any damage to, or destruction or reduction in quality of, the Buyer's Goods under the control of the Seller that is caused by:
 - (a) natural ageing of the Buyer's Goods; or
 - (b) infestation of pest, vermin or contamination emanating from within the Buyer's Goods.

12. Security and Charge

- 12.1 Despite anything to the contrary contained herein or any other rights which the Seller may have howsoever:
 - (a) where the Buyer and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Buyer and/or the Guarantor agree to mortgage and/or charge all of their joint and/or several interest in the said land, realty or to the Seller or the Seller's nominee to secure all amounts and other monetary obligations payable under these terms and conditions. The Buyer and/or the Guarantor acknowledge and agree that the Seller (or the Seller's nominee) shall be entitled to lodge where appropriate a caveat, which caveat shall be withdrawn once all payments and other monetary obligations payable hereunder have been met.
 - (b) should the Seller elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Buyer and/or Guarantor shall indemnify the Seller from and against all the Seller's costs and disbursements including legal costs on a solicitor and own client basis.

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- (c) the Buyer and/or the Guarantor (if any) agree to irrevocably nominate constitute and appoint the Seller or the Seller's nominee as the Buyer's and/or Guarantor's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause 12.1.
- 13. Defaults & Consequences of Default**
- 13.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of one percent (1%) per calendar month and such interest shall compound monthly at such a rate after as well as before any judgement.
- 13.2 If the Buyer defaults in payment of any invoice when due, the Buyer shall indemnify the Seller from and against all costs and disbursements incurred by the Seller in pursuing the debt including legal costs on a solicitor and own client basis and the Seller's collection agency costs.
- 13.3 Without prejudice to any other remedies the Seller may have, if at any time the Buyer is in breach of any obligation (including those relating to payment), the Seller may suspend or terminate the supply of Goods to the Buyer and any of its other obligations under the terms and conditions. The Seller will not be liable to the Buyer for any loss or damage the Buyer suffers because the Seller has exercised its rights under this clause.
- 13.4 Without prejudice to the Seller's other remedies at law the Seller shall be entitled to cancel all or any part of any order of the Buyer which remains unfulfilled and all amounts owing to the Seller shall, whether or not due for payment, become immediately payable in the event that:
 - (a) any money payable to the Seller becomes overdue, or in the Seller's opinion the Buyer will be unable to meet its payments as they fall due; or
 - (b) the Buyer becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
 - (c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Buyer or any asset of the Buyer.
- 14. Cancellation**
- 14.1 The Seller may cancel any contract to which these terms and conditions apply or cancel delivery of Goods at any time before the Goods are delivered by giving written notice to the Buyer. On giving such notice the Seller shall repay to the Buyer any sums paid in respect of the Price. The Seller shall not be liable for any loss or damage whatever arising from such cancellation.
- 14.2 In the event that the Buyer cancels delivery of Goods the Buyer shall be liable for any loss incurred by the Seller (including, but not limited to, any loss of profits) up to the time of cancellation.
- 15. Privacy Act 1988**
- 15.1 The Buyer and/or the Guarantor/s agree for the Seller to obtain from a credit reporting agency a credit report containing personal credit information about the Buyer and Guarantor/s in relation to credit provided by the Seller.
- 15.2 The Buyer and/or the Guarantor/s agree that the Seller may exchange information about the Buyer and the Guarantor/s with those credit providers either named as trade referees by the Buyer or named in a consumer credit report issued by a credit reporting agency for the following purposes:
 - (a) to assess an application by Buyer; and/or
 - (b) to notify other credit providers of a default by the Buyer; and/or
- (c) to exchange information with other credit providers as to the status of this credit account, where the Buyer is in default with other credit providers; and/or
- (d) to assess the credit worthiness of Buyer and/or Guarantor/s.
- 15.3
- 15.4 The Buyer consents to the Seller being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988).
- 15.5 The Buyer agrees that personal credit information provided may be used and retained by the Seller for the following purposes and for other purposes as shall be agreed between the Buyer and Seller or required by law from time to time:
 - (a) provision of Goods; and/or
 - (b) marketing of Goods by the seller, its agents or distributors in relation to the Goods; and/or
 - (c) analysing, verifying and/or checking the Buyer's credit, payment and/or status in relation to provision of Goods; and/or
 - (d) processing of any payment instructions, direct debit facilities and/or credit facilities requested by Buyer; and/or
 - (e) enabling the Buyer's account and/or the collection of amounts outstanding in the Buyer's account in relation to the Goods.
- 15.6 The Seller may give information about the Buyer to a credit reporting agency for the following purposes:
 - (a) to obtain a consumer credit report about the Buyer; and/or
 - (b) allow the credit reporting agency to create or maintain a credit information file containing information about the Buyer.
- 16. General**
- 16.1 If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 16.2 These terms and conditions and any contract to which they apply shall be governed by the laws of New South Wales and are subject to the jurisdiction of the courts of New South Wales.
- 16.3 The Seller shall be under no liability whatever to the Buyer for any indirect loss and/or expenses (including loss of profit) suffered by the Buyer arising out of a breach by the Seller of these terms and conditions.
- 16.4 In the event of any breach of this contract by the Seller the remedies of the Buyer shall be limited to damages which under no circumstances shall exceed the Price of the Goods.
- 16.5 The Buyer shall not be entitled to set off against or deduct from the Price any sums owed or claimed to be owed to the Buyer by the Seller.
- 16.6 The Seller may license or sub-contract all or any part of its rights and obligations without the Buyer's consent.
- 16.7 The Buyer agrees that the Seller may review these terms and conditions at any time. If, following any such review, there is to be any change to these terms and conditions, then that change will take effect from the date on which the Seller notifies the Buyer of such change.
- 16.8 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, drought, storm or other event beyond the reasonable control of either party.
- 16.9 The failure by the Seller to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect the Seller's right to subsequently enforce that provision.

These Terms and Conditions of Trade between Fresh Produce Group of Australia Pty Ltd and

are accepted by Authorised Signatory -

Signature :

Name :

Position :

Date :/...../.....