



**GROWER - PACKER - MARKETER**

**THE PARTY SET OUT IN SECTION A OR B OF THE SCHEDULE  
("Grower") or ("Produce Supplier")**

and

**FMC Trading Pty Ltd  
("Merchant")**

**HORTICULTURE PRODUCE AGREEMENT – MERCHANT &  
GROWER/PRODUCE SUPPLIER**

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**BETWEEN THE PARTY SET OUT IN SECTION B OF THE SCHEDULE (“Grower”) or (“Produce Supplier”)**

**AND FMC Trading Pty Ltd** ABN 12 619 532 839 of Unit 22, 189b South Centre Road, Tullamarine VIC 3043 Facsimile: (03) 8692 1103.  
Email:accounts@freshmc.com.au (“**Merchant**”)

## **RECITALS**

- A. For the term of this Agreement, the Grower or Produce Supplier (as the case may be) 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.
- B. This Agreement will commence on the Commencement Date and will continue unless it is terminated in accordance with clause 19 of this Agreement.

**IT IS AGREED** as follows:

### **1. Recitals**

The parties acknowledge the recitals are true and form part of this Agreement.

### **2. Interpretation**

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

- 2.1 if a term of this Agreement conflicts with the Code, the Code prevails;
- 2.2 headings are for convenience only and do not affect interpretation;
- 2.3 the singular includes the plural and the plural includes the singular;
- 2.4 a gender includes all genders;
- 2.5 where a word or phrase is defined its other grammatical forms have a corresponding meaning;
- 2.6 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;
- 2.7 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;
- 2.8 a reference to any party to this Agreement or any other agreement or document includes the party’s successors and assigns;
- 2.9 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;
- 2.10 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;

- 2.11 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
- 2.12 a reference to conduct includes, without limitation any omissions, statement or undertaking, whether or not in writing.

### 3. Definitions

In this Agreement:

- 3.1 “**Additional Fees**” means additional fees to be charged by the Merchant to the Grower for Services provided.
- 3.2 “**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.
- 3.3 “**Agreement**” means this Horticultural Produce Agreement and the Schedule and the Annexure.
- 3.4 “**Authorised Officer**” means, in relation to a corporation which is a party:
- 3.4.1 an employee of the party whose title contains either of the words Director or Manager;
  - 3.4.2 a person performing the function of any of them;
  - 3.4.3 a solicitor acting on behalf of the party; or
  - 3.4.4 a person appointed by the party to act as an Authorised Officer for the purposes of this agreement and notified to the others.
- 3.5 “**Business Day**” means a day that is not a Saturday, Sunday, public holiday, or Markets Holiday, in the Relevant State.
- 3.6 “**Code**” means the Horticulture Code of Conduct contained in the *Competition and Consumer (Industry Codes and Horticulture) Regulations 2017 (Cth)* as amended from time to time.
- 3.7 “**Commencement Date**” means the date to be completed in Section C of the Schedule.
- 3.8 “**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:
- 3.8.1 delivery for the purposes of this Agreement will not occur when the Merchant rejects the produce prior to the Deliver (Non-Delivery Event); and
  - 3.8.2 where the Non-Delivery Event has occurred, delivery may subsequently occur, upon:

- 3.8.2.1 the Merchant and Grower agreeing new terms and documenting any material changes to the existing Schedule in writing (as accepted by the Grower); and
  - 3.8.2.2 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
  - 3.8.2.3 Deliver or Delivered has a corresponding meaning.
- 3.9 **“Fresh Markets Australia”** means the national organisation representing each of the six market chambers across Brisbane, Sydney, Melbourne, Adelaide, Perth and Newcastle.
- 3.10 **“FreshSpecs Produce Specifications”** means produce specifications published by Fresh Markets Australia from time to time.
- 3.11 **“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.
- 3.12 **“GST”** means goods and services tax payable under the GST Law and an expression used in this Agreement in relation to GST will have the meaning used in or attributed to that expression by the GST Law from time to time;
- 3.13 **“GST Act”** means *A New Tax System (Goods and Services Tax) Act 1999* (Cth);
- 3.14 **“GST Law”** has the same meaning as the definition of “GST Law” in the GST Act”
- 3.15 **“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.
- 3.16 **“Including”** or similar expressions are not words of limitation.
- 3.17 **“Markets Holiday”** is a day on which the market, in the Relevant State is closed.
- 3.18 **“Merchant”** means the entity described on the first page of this Agreement or related Persons deemed to be in association with the merchant.
- 3.19 **“Merchant Requirements”** means the Produce Specification Requirements provided by the Merchant to the Grower from time to time prior to the Purchase Price being determined with respect to the Produce.
- 3.20 **“National Measurement Act”** means the *National Measurement Act 1960* (Cth) and *National Trade Measurement Regulations 2009* (Cth) as amended from time to time.
- 3.21 **“Non-Complying Produce”** means Produce determined as non-complying produce under clause 11.
- 3.22 **“Non-Compliance Day”** means the day, being two (2) Business Days of the Produce being treated as Non-Complying Produce under clause 11 (or otherwise) of this Agreement, upon which the Merchant makes an election

under clause 12 or 14;

- 3.23 **“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.
- 3.24 **“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.
- 3.25 **“Produce Specification”** means the grade/class as stamped on the packaging in which the Produce is contained when Delivered.
- 3.26 **“Produce Specification Requirements”** means any particular product specifications that the Merchant requires in order for Produce to be accepted by it including but not limited to quality and shelf life of the Produce.
- 3.27 **“Produce Supplier”** means a person or entity, other than a Grower, that supplies Produce for sale and for the purposes of this Agreement being the person or entity specified in Section B of the Schedule.
- 3.28 **“Purchase Price”** means the amount determined under clause 5.
- 3.29 **“Reporting Period”** means the reporting period for the Statement specified in the Schedule.
- 3.30 **“Relevant State”** means the state in which the Merchant’s premises, to which the Grower despatches Produce are situated.
- 3.31 **“Relevant State Legislation”** means the following legislation that is applicable to the Relevant State:
- 3.31.1 *Electronic Transactions (Queensland) Act 2001;*
  - 3.31.2 *Electronic Transactions Act 2000 (SA);*
  - 3.31.3 *Electronic Transactions (Victoria) Act 2000;*
  - 3.31.4 *Electronic Transactions Act 2000 No 8 (NSW); and*
  - 3.31.5 *Electronic Transactions Act 2011 (WA).*
- 3.32 **“Reporting Statement”** means the statement to be provided by the Merchant under clause 6.5.
- 3.33 **“Return”** has the meaning in clause 15.1.
- 3.34 **“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.
- 3.35 **“Service”** means the service 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 from time to time.
- 3.36 **“Statement Period”** means the statement period specified in the Schedule.
- 3.37 **“Termination Notice”** means a written notice of termination provided by the Grower or the Merchant to the other party in accordance with clause 22.1 of

this Agreement.

3.38 **“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 and as set out in this Agreement;

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

#### 4. **Terms and Conditions**

##### 4.1 **General**

4.1.1 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:

4.1.1.1 by specific written notice to the contrary;

4.1.1.2 this Agreement is replaced by agreement at a later date;  
or

4.1.1.3 the transaction is not a transaction that would be covered by the Code.

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

##### 4.2 **Acknowledgements**

###### 4.2.1 **Grower**

The Grower acknowledges that this Agreement incorporates the Merchant's Terms of Trade (for the purposes of section 10 of the Code) and that the Schedule forms part of this Agreement and applies to all transactions between the Merchant and the Grower.

###### 4.2.2 **Produce Supplier**

4.2.2.1 The Produce Supplier agrees to be bound by the terms of this Agreement as they apply to a Grower (excluding the warranty in clause 4.3.3.3 insofar as the Produce Supplier cannot make that warranty).

4.2.2.2 The Produce Supplier acknowledges that this Agreement incorporates the Merchant's Terms of Trade and that the Schedule forms part of this Agreement and applies to all transactions between the Merchant and the Produce Supplier.

4.2.2.3 The Produce Supplier warrants that the Produce supplied by the Produce Supplier to the Merchant is of the quality required by the Merchant pursuant to clause 7 under this Agreement.

##### 4.3 **Transfer of Title and Risk**

4.3.1 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 sub-clause 4.3.2.

- 4.3.2 Despite anything else in this Agreement, title to the Produce will only pass to the Merchant:
  - 4.3.2.1 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; or
  - 4.3.2.2 where the circumstances in clause 4.3.2.1 do not apply, at such time that the parties agree on a price for the Produce.
- 4.3.3 The Grower covenants and warrants that:
  - 4.3.3.1 they have all right, title and interest in and to the Produce;
  - 4.3.3.2 title will pass to the Merchant clear of all encumbrances, claims and other adverse interests; and
  - 4.3.3.3 the Grower is the grower of the Produce.
- 4.3.4 The Merchant will assume risk in respect of the Produce once title to the Produce passes to the Merchant under subclauses 4.3.2 and 2.3(b).
- 4.3.5 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.
- 4.3.6 The reasonable care and skill the Merchant must exercise under clause 4.3.5 must be exercised until title and risk in the Produce passes to the Merchant.
- 4.3.7 The Merchant is shall not be obliged to keep insurances in respect of Produce in their legal and physical control. If the Merchant does have insurance, the following information is to be set out in the Schedule:
  - 4.3.7.1 the Merchant's insurer;
  - 4.3.7.2 the maximum amount of insurance cover provided by the Merchant's insurance policy in respect of claims that may be made; and
  - 4.3.7.3 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), is set out in the Schedule.
- 4.3.8 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 Merchant's



insurance (if any).

4.3.9 The Parties acknowledge and agree that:

4.3.9.1 if the details of Insurance in the Schedule are blank, the Merchant warrants that it does not hold insurance; and

4.3.9.2 any insurance held by the Merchant is for the sole benefit of the Merchant and does not confer any benefits on the Grower.

## 5. Price Determination

5.1 The Purchase Price for Produce shall be either:

5.1.1 determined as an Agreed Price for the specific Produce;

5.1.1.1 in writing prior to Delivery to the Merchant; or

5.1.1.2 on Delivery to the Merchant; or

5.1.2 an amount calculated by a method or formula set out in the Schedule;

as selected by the parties to this Agreement.

5.2 If clause 5.1.1 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 by the Merchant.

## 6. Merchant Payments and Reporting Obligations

6.1 The Merchant agrees to make payments to the Grower in the following manner:

6.1.1 Payment must be made within the Payment Period.

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

6.1.3 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 for the Services are disclosed and agreed by the Grower and the Merchant and the Services are set out in the Schedule).

6.2 Unless specifically agreed in writing by the Merchant and Grower, the Grower is responsible for all transport and other costs incurred in transporting the Produce to the Merchant and will not be reimbursed by the Merchant for such costs.

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

- 6.3.1 any payment made on behalf of the Grower where the Merchant has agreed to make such payments (e.g. transport/unloading /packaging);
  - 6.3.2 levies and fees for service payable under State or Commonwealth legislation or any voluntary arrangement; and
  - 6.3.3 GST in respect of any item for which a tax invoice has been issued by the Merchant to the Grower or any payment under clauses 6.3.1 and 6.3.2.
- 6.4 The Merchant will not charge the Grower for Services performed by the Merchant, other than as agreed and set out in this Agreement.
- 6.5 The Merchant will provide a Reporting Statement to the Grower containing the following details, covering the Reporting Period:
- 6.5.1 Grower's reference or shipping note number;
  - 6.5.2 description of the quality of Produce purchased;
  - 6.5.3 details of the quantity of Produce purchased;
  - 6.5.4 the date or dates of the purchases of Produce;
  - 6.5.5 the Purchase Price for the Produce (including, if the Purchase Price was determined by a method or formula, the gross sale price of the Product);
  - 6.5.6 the date on which the Produce was physically received by the Merchant;
  - 6.5.7 the date on which the Produce was Delivered to the Merchant;
  - 6.5.8 details of any Produce not sold; and
  - 6.5.9 details of any Non-Complying Produce that is disposed of, or otherwise dealt with, in accordance with clauses 12.1, 12.2, 12.3, 12.4, 12.7 and 12.8 of this Agreement and, where Produce is to be destroyed, the reason why the Produce was, or is to be, destroyed.
- 6.6 The Reporting Statement must be given to the Grower within the Statement Period.
- 6.7 The Merchant will issue a complying tax invoice to the Grower in respect of any item for which GST is chargeable.

## **7. Grower Obligations**

- 7.1 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 and containers, prior to delivery of the Produce to the Merchant.
- 7.2 The Grower must deliver the Produce at the time and location specified by the Merchant from time to time.
- 7.3 The Grower warrants that:

- 7.3.1 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
  - 7.3.2 it has complied with the National Measurement Act with respect to the Produce.
- 7.4 The Grower warrants that the Produce dispatched to the Merchant is fit for its purpose and:
  - 7.4.1 in every case – is packed or presented and complies with the written Produce Specification Requirements including but not limited to quality and shelf life (as per details supplied to the Grower) 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 (as per Merchant Requirements provided); and
  - 7.4.2 complies with the Produce Specifications.
- 7.5 The Grower must not dispatch Produce to the Merchant that:
  - 7.5.1 does not comply with the Product Specification;
  - 7.5.2 does not comply with the Product Specification Requirements;
  - 7.5.3 has not been solicited by the Merchant; and
  - 7.5.4 notwithstanding subclauses 7.5.1, 7.5.2 and 7.5.3, where this Agreement has not been agreed to in writing by the Grower.
- 7.6 The Grower agrees to supply details of their registered Australian Business Number (ABN) to the Merchant prior to any payment being made by the Merchant.

## 8. **Services by Merchant**

- 8.1 The Merchant will supply the Service (if any) to the Grower.
- 8.2 The Grower will pay Additional Fees for Services referred to in clause 8.1 and provided by the Merchant as set out in the Schedule.
- 8.3 The amount to be paid by the Grower for the Service provided by the Merchant shall be calculated upon the Service being completed.
- 8.4 The Grower will pay the amount calculated under clause 8.3 within the number of Business Days of the Merchant providing the Service specified in the Schedule.

## 9. **Liability of Grower**

- 9.1 The Grower shall be liable to insure (for 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.
- 9.2 The Grower shall be liable to compensate the Merchant for all direct or

indirect losses, damages, costs, claims and expenses which the Merchant may incur as a result of any act or omission of the Grower.

## 10. **Liability of Merchant**

10.1 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:

10.1.1 the accuracy, description, relevant, completeness, merchantable quality, fitness for any purpose or any other matter relating to the Service under this Agreement;

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

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

10.1.4 any claim against the Merchant in relation to the Service, the produce or the consumption of the Produce; and

10.1.5 any other conduct in relation to which the Merchant has assumed the risk or liability under this Agreement.

## 11. **Complying and Non-Complying Produce**

11.1 The Grower must ensure that Produce supplied to the Merchant complies with clauses 7.1, 7.2, 7.3 and 7.4 or that Produce will be treated as Non-Complying Produce.

11.2 Produce will also be treated as Non-Complying Produce where the Merchant determines that the Produce is Non-Complying Produce for any one of the following reasons:

11.2.1 the Grower does not have all the right, title and interest in and to the Produce;

11.2.2 the Grower cannot pass title to the Merchant free and clear of all encumbrances, claims and other third party interests;

11.2.3 the Grower is not the grower (as defined by the Code) of the Produce; and

11.2.4 the Produce in whole or in part has not been solicited by the Merchant.

## 12. **Effect of Produce being Non-Complying Produce – Pre-Delivery and After Delivery**

12.1 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 date the election is made being the Non-Compliance Day) to:

12.1.1 reject all of the Produce;

- 12.1.2 accept all of the Produce; or
  - 12.1.3 accept part of the Produce and reject the balance of the Produce.
- 12.2 Where the Merchant elects to accept all or part of the Produce under clause 12.1, or fails to give a notice under clause 12.3 to reject all or part of the Produce within two (2) Business Days after the Produce has been Delivered to the Merchant, or claim a credit for Produce under clause 14.1 (“**Accepted Produce**”), then this Agreement shall apply to require the Merchant to purchase the Accepted Produce for the purchase Price relevant to that Accepted Produce.
- 12.3 Where the Merchant elects to reject all or part of the Produce (the “**Rejected Produce**”) under clause 12.1, then subject only to clause 12.3.4:
- 12.3.1 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;
  - 12.3.2 the Grower is not entitled to the Purchase Price with respect to the Rejected Produce;
  - 12.3.3 the Merchant will within twenty-four (24) hours of the Non-Compliance Day advise the Grower by telephone, fax, e-mail, or other electronic means of the rejection; and
  - 12.3.4 within two (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:
    - 12.3.4.1 wishes to retake possession of the Rejected Produce; or
    - 12.3.4.2 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
    - 12.3.4.3 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.
- 12.4 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.
- 12.5 The parties agree that the Merchant may determine the return price payable 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.
- 12.6 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.
- 12.7 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:

12.7.1 the Grower does not respond within twenty-four (24) hours of notification in accordance with clause 12.3.4;

12.7.2 the Grower fails to retake possession of the Produce within five (5) Business Days of the Grower indicating an intention to do so under clause 12.3.4; or

12.7.3 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 12.7.3.

12.8 Where clause 12.7 applies, any destruction, disposal and/or deliver of Produce is at the Grower's expense.

### **13. Pooling of Produce**

13.1 The Merchant may pool Produce (whether or not the Produce has been rejected) supplied by the Grower under this Agreement with other Produce if:

13.1.1 the other Produce is of the same quality as the produce delivered by the Grower; and

13.1.2 either:

13.1.2.1 the Grower's Produce and the other Produce meet the quality requirements, specified in clause 7.4 of this Agreement; or

13.1.2.2 the Produce is accepted by the Merchant pursuant to clause 12.4 and 12.5.

13.2 Where the Merchant pools Produce in accordance with clause 13.1, 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 to the Grower.

### **14. Effect of Produce being Non-Complying Produce – After Purchase**

14.1 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 to elect (the date the election is made being the Non-Compliance Day) to:

14.1.1 claim a credit for the Produce under clause 14.2;

14.1.2 not claim a credit for the Produce under clause 14.2; or

14.1.3 claim a credit for part of the Produce.

14.2 Where the Merchant elects to claim a credit for all or part of the Produce under clause 14.1, then:

14.2.1 the Merchant will advise the Grower by telephone, fax, email or any

other electronic means of the claim for credit;

14.2.2 within two (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

14.2.3 where there has been a return the Merchant is entitled at their discretion to deduct up to a maximum of the sale price of the Produce (agreed between the Merchant and a third party on an arm's length basis in respect of the Produce) (after allowing for any proceeds of any sale of such Produce retained by the Merchant including the proceeds of any subsequent sale to a third party of such Produce) from the amounts payable by the Merchant to the Grower under clause 6.1.

14.3 The Grower acknowledges that any amount deducted under clause 14.2 represents a genuine pre-estimate of the Merchant's loss as a result of the Produce being Non-Complying Produce.

## 15. Returns of Produce

15.1 The Grower agrees that any claims for credit which result following the sale of any Produce by the Merchant to a third party, which claims are accepted by the Merchant, due to the Produce being Non-Complying Produce, may be dealt with under clause 14.1.

15.2 Produce returned under clause 15.1 will be Non-Complying Produce and subject to clauses 6.5, 14.1 and 14.2 of this Agreement.

## 16. Dispute Resolution

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

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

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

16.2 the Merchant and the Grower shall use the following to resolve the dispute:

16.2.1 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

16.2.2 any Fresh Markets Australia dispute resolution procedure in place from time to time; and/or

16.2.3 the dispute resolution procedures under Part 5 of the Code; and

16.2.4 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).

## 17. 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.

**18. 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.

**19. Entire Agreement**

This Agreement (inclusive of the Schedule) represents the entire agreement and understanding between the Grower and the Merchant and supersedes all prior agreements between the parties.

**20. 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.

**21. Varying this Agreement**

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

**22. Terminating this Agreement**

22.1 This Agreement may be terminated by the Merchant or the Grower by providing notice in writing to the other party.

22.2 Any such termination:

22.2.1 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;

22.2.2 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

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

22.3 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.

22.4 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 or any other such period as set out in the Code.

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



- 22.5.1 clause 22.2 and clause 22.3 shall apply; and
- 22.5.2 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 fourteen (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).

23. **Confidentiality**

All details contained in this Agreement or acquired as a result of this Agreement or in any agreement as to price shall remain confidential between the parties except to the extent a party is required by law to disclose its contents. A party may disclose the contents of this Agreement or any agreement as to price to its professional advisers and its directors, officers, employees, servants and agents on a confidential basis.

24. **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.

25. **Indemnity**

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

26. **Good Faith**

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

27. **Electronic signatures and Authorised Representatives**

27.1 The parties consent to:

- 27.1.1 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

- 27.1.2 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).

27.2 The parties acknowledge and agree that for the purposes of the Code and acceptance of 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.

27.3 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.

## 28. Notices

- 28.1 Any notice or other communication to or by any party must be:
- 28.1.1 in writing and in the English language. For the avoidance of doubt, this includes "in writing" as that expression is defined in the ETA;
  - 28.1.2 addressed to the recipient outlined in the Schedule or to any other address as the recipient may have notified the sender; and
  - 28.1.3 be agreed to in writing by the party or by an Authorised Officer of the sender.
- 28.2 In addition to any other method of service authorised by law, the notice may be:
- 28.2.1 personally, served on a party;
  - 28.2.2 left at the party's current address for service;
  - 28.2.3 sent to the party's current address for service by prepaid ordinary mail or if the address is outside Australia by prepaid airmail;
  - 28.2.4 sent by facsimile to the party's current numbers for service; or
  - 28.2.5 sent by electronic transmission to the party's electronic mail address.
- 28.3 If a notice is sent or delivered in the manner provided in clause 28.2 it must be treated as given to or received by the addressee in the case of:
- 28.3.1 delivery in person, when delivered;
  - 28.3.2 delivery by post:
    - 28.3.2.1 in Australia to an Australian address, the fourth Business Day after posting; or
    - 28.3.2.2 in any other case, on the tenth Business Day after posting;
    - 28.3.2.3 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
    - 28.3.2.4 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.

**DULY EXECUTED** by the parties.

**EXECUTED** by [REDACTED] **PTY LTD** in )  
accordance with Section 127(1) of the )  
Corporations Act 2001: )

.....  
\*Director/\*Sole Director and Sole Secretary

.....  
Print Full Name

.....  
\*Director/\*Secretary

.....  
Print Full Name

(\*please delete the inapplicable title)  
(Note: please affix common seal if required by the Company's  
Constitution)

**EXECUTED** by **FMC TRADING PTY LTD** in )  
accordance with Section 127(1) of the )  
Corporations Act 2001: )

.....  
\*Director/\*Sole Director and Sole Secretary

.....  
Print Full Name

.....  
\*Director/\*Secretary

.....  
Print Full Name

(\*please delete the inapplicable title)  
(Note: please affix common seal if required by the Company's  
Constitution)

## SCHEDULE 1

# HORTICULTURE PRODUCE AGREEMENT – MERCHANT

## FMC Trading Pty Ltd

If the party to the Agreement is a grower (person or entity that grows Produce for sale and for the purposes of this Agreement), please fill out the details in Section A below.

If the party to this Agreement is not a grower, but otherwise supplies Produce for sale and for the purposes of this Agreement, please fill out the details in Section B below.

### SECTION A – DETAILS OF GROWER

<b>Grower:</b>			
<b>ABN:</b>			
<b>Commencement of Date of HPA:</b>			
<b>Warranty:</b>	The Grower listed above is the grower of the Produce		
<b>Grower Contact:</b>			
<b>Postal Address:</b>			
<b>Street Address:</b>			
<b>Telephone:</b>	Bus:	Fax:	Mob:
<b>Email:</b>			
<b>Bank A/C Details:</b>	Account Name:	Bank:	Branch:
		BSB:	A/C No:
<b>Street Address:</b>			
<b>Mobile number of Merchant that the Grower must send electronic acceptance of the HPA (which incorporates the Terms of Trade) and this Schedule to:</b>			

By signing or accepting this Schedule in writing I/we, for and on behalf of and with the authority of the Grower, agree that I/we have read and understood the attached Horticulture Produce Agreement and that upon such signing and acceptance of the Horticulture Produce Agreement the Grower will be bound by the terms of it, this Schedule and any relevant Terms of Trade and that a formal contract shall be deemed constituted between the Merchant and the Grower. By signing of acceptance of this Schedule, I/we also acknowledge, for and on behalf of and with the authority of the Grower, the recommendation set out in Section D below.

**EXECUTED by the MERCHANT**

**Where the Merchant is an Individual**

**Where the Merchant is a Company**

**Individual Merchant sign above**

**Director**

**Director/Company Secretary**

Where the Merchant is a partnership or other form of joint operation, all of the individuals or entities should sign.

**EXECUTED by the GROWER**

**Where the Grower is an Individual**

**Where the Grower is a Company**

**Individual Grower sign above**

**Director**

**Director/Company Secretary**

Where the Grower is a partnership or other form of joint operation, all of the individuals or entities should sign.

<b>SECTION B – DETAILS OF PRODUCE SUPPLIER- NON-GROWER</b>
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<b>Nature of Relationship with Merchant:</b>			
<b>Produce Supplier:</b>			
<b>ABN:</b>			
<b>Commencement of Date of HPA:</b>			
<b>Warranty:</b>	The Produce Supplier listed above is the supplier of the Produce		
<b>Produce Supplier Contact:</b>			
<b>Postal Address:</b>			
<b>Street Address:</b>			
<b>Telephone:</b>	<b>Bus:</b>	<b>Fax:</b>	<b>Mob:</b>
<b>Email:</b>			
<b>Bank A/C Details:</b>	<b>Account Name:</b>	<b>Bank:</b>	<b>Branch:</b>
		<b>BSB:</b>	<b>A/C No:</b>
<b>Street Address:</b>			
<b>Mobile number of Merchant that the Produce Supplier must send electronic acceptance of the HPA (which incorporates the Terms of Trade) and this Schedule to:</b>			

By signing or accepting this Schedule in writing I/we, for and on behalf of and with the authority of the Produce Supplier, agree that I/we have read and understood the attached Horticulture Produce Agreement and that upon such signing and acceptance of the Horticulture Produce Agreement the Grower will be bound by the terms of it, this Schedule and any relevant Terms of Trade and that a formal contract shall be deemed constituted between the Merchant and the Produce Supplier. By signing of acceptance of this Schedule, I/we also acknowledge, for and on behalf of and with the authority of the Produce Supplier, the recommendation set out in Section D below.

**EXECUTED by the MERCHANT**

**Where the Merchant is an Individual**

**Where the Merchant is a Company**

**Individual Merchant sign above**

**Director**

**Director/Company Secretary**

Where the Merchant is a partnership or other form of joint operation, all of the individuals or entities should sign.

**EXECUTED** by the **PRODUCE SUPPLIER**

**Where Produce Supplier is an Individual    Where the Grower is a Company**

**Individual Produce Supplier sign above**

**Director**

**Director/Company Secretary**

Where the Produce Supplier is a partnership or other form of joint operation, all of the individuals or entities should sign.

## SECTION D – DETAILS FOR HORTICULTURE PRODUCE AGREEMENT

### 1. PRICE

- The amount agreed by the Merchant and Grower in writing being \$\_\_\_\_\_ ;
- An amount to be agreed between the Merchant and Grower in writing either before, or immediately upon Delivery of the Produce to the Merchant in accordance with clause 5.1.1 of the HPA; or
- The amount to be determined using the formula [Sales Price less a Margin], where

**Sales Price** means the price at which the Merchant sells the Produce to a third party; and

**Margin** means an amount expressed as a percentage which the Merchant will deduct from the Sale Price when calculated as a gross return to the Grower being not more than 40%. This includes cartage and handling of produce, cold storage of produce, disposal of waste and repackaging of damaged packaging.

### 2. PAYMENT (*Clause 6.1.1*)

Payment will be made no later than 60 Business Days from the end of the Week during the relevant Produce is Delivered to the Merchant.

### 3. SPECIFICATIONS (*Clause 7*)

As at the date of this Schedule being provided to the Grower, the Produce must comply in all respects with:

- The produce Specification Requirement (compiled by the Merchant and provided to the Grower); or
- FreshSpecs Produce Specifications

Or such other specifications notified by the Merchant to the Grower during the term of the HPA in writing.

### 4. REPORTING PERIOD (*Clause 6.5*)

<b>Reporting Period:</b>	1 MONTH
<b>Statement Period:</b>	Within 28 Business Days from the end of the relevant Reporting Period

### 5. SERVICES (*Clause 6.4*)

Type of Service	Price (inclusive of GST)*
<input type="checkbox"/> Warehousing	\$ (per pallet/per day)
<input type="checkbox"/> Repacking	\$ (per package)



<input type="checkbox"/>	Delivery / Pickup	\$	(per pallet)
<input type="checkbox"/>	Conditioning/ripening	\$	(per pallet)
<input type="checkbox"/>	Cold Storage	\$	(per pallet/per day)
<input type="checkbox"/>		\$	

\*GST is payable by the Merchant as applicable.

Should the Produce supplied under these Terms be subsequently Delivered and sold to the Merchant, the Merchant reserves the right to waive all or part of the charges otherwise applying under these Terms.

**6. DISPUTE RESOLUTION (Clause 16) & NOTICE DETAILS**

	Name	Address	Phone	Email and Fax
<b>Grower's Contact:</b>				
<b>Merchant's Contact:</b>	FMC Trading Pty Ltd	189B South Centre Rd, Tullamarine, Vic-3043	(03) 9948 1646	<a href="mailto:accounts@freshm.com.au">accounts@freshm.com.au</a> (03)8692 1103

**7. COOLING OFF (Clause 22.4 and 22.5)**

<b>Cooling Off Period:</b>	Number of Days: 7 (please note that the Code requires at least 7 days cooling off to be provided)
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**8. INSURANCE (Clause 4.3) (if applicable)**

<b>Insurer:</b>	
<b>Maximum amount of insurance cover provided by the policy in respect of claims that may be made:</b>	
<b>Defined events covered by insurance:</b>	

**SECTION E – INDEPENDENT LEGAL ADVICE**

The Merchant recommends that the Grower seek independent legal advice in relation to the Horticulture Produce Agreement prior to it being entered into between the Merchant and Grower.