

Horticulture Produce Agreement - Agency

Commercial Terms

Grower	MBM
Name	Mountain Blue Marketing Pty Ltd ACN 611 954 593
ABN	41 611 954 593
Address	1372A Bruxner Hwy Lindendale NSW 2480
Representative	Andrew Bell
Phone	+61 422 234 124
Email	andrew@mountainblue.com.au

Commercial terms	Details
Start Date	
End Date	This agreement will commence on the Start Date and will terminate on the date the agreement is terminated under clause 24.
Cooling-off Period	7 days after the day on which this Agreement is entered into
MBM's appointment <i>(tick applicable box)</i>	<input checked="" type="checkbox"/> Exclusive <input type="checkbox"/> Non-exclusive
Delivery Address	The location nominated by MBM from time to time.
Reporting Period	Monthly
Statement Period	21 days after the end of each month during the selling season
Produce	<p>All fruit grown by the Grower from varieties owned or licensed by the Licensor and provided to the Grower.</p> <p>And any other produce agreed by the parties from time to time</p>
Quantity Requirements <i>(tick applicable box)</i>	<input checked="" type="checkbox"/> No <input type="checkbox"/> Yes If Yes, specify:
Quality Requirements	The Produce must meet MBM internal specifications regarding variety, size, and quality advised to the Grower from time to time. Growers must use labels and packaging approved or sourced by Mountain Blue. The Grower may use their own vendor, but artwork and a physical punnet must be approved prior to use. It must meet all industry requirements that are needed for legal sale and meet retailer specifications current in the future and/or Fresh Markets Australia's FreshSpecs Produce Specifications for each type of Horticulture Produce delivered by the Grower. The Grower must also comply with all items in clause in 13.3

Produce Pooling <i>(tick applicable box)</i>	<input type="checkbox"/> Allowed (in which case clause 15 applies)	<input checked="" type="checkbox"/> Not allowed (in which case clause 15 does not apply)	
Marketing Fee	For all other sales, No lower than 12.5% and no higher than 17% x Gross Wholesale Return		
Other Costs	Primary Freight Cost at cost plus 0% Return Freight Cost at cost plus 0% Packaging supplied by MBM, including pallets, cartons and RPCs, at cost plus 0% Any applicable GST at the rate stipulated by the GST Act Any applicable taxes, duties, charges, levies or fees payable under any law in connection with this Agreement at the statutory rate Any sorting and repacking costs incurred by MBM in relation to Produce delivered by the Grower, including reasonable internal costs, at cost plus 0%		
Payment Period	The later of 21 days after the end of each Consignment Week or 5 Business Days after receipt by MBM of the Gross Wholesale Return from any Customers		
Grower's Bank Account	Account name	BSB	Account number
MBM Insurance <i>(tick applicable boxes)</i>	Not held (in which case clause 17 does not apply)		
Special Conditions	N/A		

By signing below the parties acknowledge they have read and accept these Commercial Terms and the attached Legal Terms.

EXECUTED by **THE PARTY SO SPECIFIED AS**)
THE GROWER in accordance with section 127 of)
 the Corporations Act 2001:)

.....
 Director/Secretary

.....
 Director

.....
 Name of Director/Secretary
 (BLOCK LETTERS)

.....
 Name of Director
 (BLOCK LETTERS)

.....
 Date

.....
 Date

EXECUTED by **MOUNTAIN BLUE MARKETING**)
PTY LTD ACN 611 954 593 in accordance with)
 section 127 of the Corporations Act 2001:)

Director/Secretary

Director

Name of Director/Secretary
(BLOCK LETTERS)

Name of Director
(BLOCK LETTERS)

Date

Date

Legal Terms

1. Appointment

1.1. The Grower appoints MBM as its agent to market and sell the Produce on behalf of the Grower on the terms of this Agreement.

1.2. The appointment referred to in clause 1.1 will be exclusive, if so specified in the Commercial Terms.

2. Term

2.1. This Agreement will commence on the Start Date and finish on the End Date, unless lawfully terminated earlier.

3. Special Conditions

3.1. The parties agree that the Special Conditions form part of this Agreement.

4. MBM's reporting obligations

4.1. For each Reporting Period, MBM will give the Grower a statement for the Reporting Period specifying:

- (a) a breakdown of Product sold into each market segment (including the prevailing sale prices);
- (b) calculations of actual (or expected where actuals are not known) returns and an analysis of the results as against marketing plans;
- (c) anticipated prices for the next 14 days;
- (d) the dates on which the Grower's Produce was delivered to MBM;
- (e) the dates of sale of the Grower's Produce by MBM;
- (f) the type and quantity of the Grower's Produce sold;
- (g) the price received for the Grower's Produce sold;
- (h) details of each amount deducted by MBM from the sale price of the Grower's Produce; and

(i) details of any amounts of the Grower's Produce not sold by MBM, including:

- I. the reasons why the Grower's Produce was not sold;
- II. details of any amount of the Grower's Produce destroyed by MBM, and the incurred costs of destruction;
- III. details of any amounts of the Grower's Produce held by MBM at the end of the Reporting Period (**Statement**).

4.2. MBM will give the Grower the Statement within the Statement Period.

5. MBM's other obligations

5.1. While the Grower's Produce is under MBM's control, MBM will exercise all reasonable care and skill in handling and storage to ensure that the Produce remains of the highest quality possible until title to the Grower's Produce passes to a Customer.

5.2. MBM:

- (a) will act in the best interests of the Grower when selling Produce under this Agreement, and
- (b) will not sell the Grower's Produce, other than on an arm's length basis, unless MBM has first obtained the Grower's prior written consent.

6. Marketing Fee and Other Costs

6.1. Subject to clause 6.3, the Grower will pay MBM the Marketing Fee if the Produce delivered by the Grower is sold by MBM and payment is received from the Customer/s by MBM.

6.2. The Grower will pay MBM the Other Costs.

- 6.3. The Marketing Fee and Other Costs will be deducted by MBM from the Gross Wholesale Return and will be paid directly to itself or other third parties prior to paying the Sale Proceeds to the Grower.
- 6.4. If there is no Gross Wholesale Return from which to deduct the Other Costs, the Grower will pay MBM the Other Costs within 21 days of MBM's request for payment.

7. Price

- 7.1. MBM will use its best endeavours to sell the Grower's Produce for the best possible price.

8. Sale Proceeds

- 8.1. Subject to clause 8.2, MBM will pay the Grower the Sale Proceeds to the Grower's Bank Account within the Payment Period.
- 8.2. MBM may offset any amount due to it from the Grower against any amount MBM owes the Grower in relation to this Agreement at any time by notice in writing.

9. MBM obligations

- 9.1. MBM will:
- (a) actively consult with and seek direction from the Grower as to the marketing and sale of Produce delivered by the Grower;
 - (b) develop marketing and sale programmes to attempt to ensure the optimum marketability of the Produce delivered by the Grower;
 - (c) actively promote the Produce through appropriate media channels in the market using reasonable efforts to maximise returns;
 - (d) display any logo, warning and/or instruction as required by law or a Customer's quality assurance programmes except to the extent the Grower is obligated to display any logo, warning and/or instruction on or in relation to the Produce;
 - (e) attend to sales transactions with Customers, including the

negotiation of any dispute relating to the Produce (eg price and/or quality);

- (f) take measures to minimise Customer credit risk; and
- (g) in the ordinary course of business issue invoices to Customers weekly or at such other reasonably practicable times.

10. Delivery of Produce

- 10.1. For the purposes of this Agreement, delivery of Produce occurs when the Produce arrives at the Delivery Address.
- 10.2. The Grower will bear the costs of delivery of the Produce by the Grower to the Delivery Address (**Primary Freight Cost**).
- 10.3. The Grower will use the Grower's best endeavours to provide MBM with accurate forecasts as to Produce crop yields prior to the beginning of each season as reasonably requested by MBM, with weekly updates during harvesting. As soon as the Grower becomes aware of any reason to vary forecasts due to food safety, Produce quality, pest infestation, disease or other affliction, the Grower will notify MBM immediately. The Grower will not, however, be liable to MBM for any deviation from forecast Produce crop yields.
- 10.4. Prior to dispatching any Produce, the Grower will notify MBM in writing of the type, quantity, Produce Characteristics and expected delivery date of the Produce to be delivered from time to time.
- 10.5. The Grower will use the Grower's best endeavours to deliver Produce of the type and quality, in the quantity, to the addresses and in accordance with any other directions specified by MBM in any delivery direction (**Delivery Direction**).
- 10.6. The Grower will, at the Grower's cost, deliver Produce on pallets and packaged in cartons or RPCs as directed by MBM in any Delivery Direction from time to time.

10.7. If a Delivery Direction specifies Produce to be delivered to MBM or its nominee (other than a Customer), the Grower must include with each delivery documentation that accurately describes the:

- (h) quantity of Produce being delivered;
- (i) quantity of pallets and RPCs being delivered;
- (j) variety, size and class of Produce being delivered;
- (k) characteristics of Produce being delivered; and
- (l) transport company delivering the Produce (**Consignment Note**).

10.8. If a Delivery Direction specifies Produce to be delivered to a Customer (**Direct Delivery**), the Grower must include with each delivery a docket in the form prescribed by MBM on MBM letterhead accurately describing the:

- (a) quantity and type of Produce being delivered;
- (b) the Produce with any applicable Customer product number;
- (c) number of pallets and RPCs;
- (d) date of delivery to Customer; and
- (e) Customer order or reference number (**Delivery Docket**).

10.9. The Grower will email MBM a copy of any Consignment Note or Delivery Docket on the day the Grower dispatches any Produce.

10.10. In the case of a Direct Delivery, the Grower must:

- (a) have traceability of Produce and appropriate labelling for Customer requirements;
- (b) provide outbound quality assurance (**QA**) reports to MBM upon batch completion. If any outbound QA report is flagged amber or below (ie red) by the Grower, the Grower must notify MBM and not send the report to the Customer without MBM's prior written consent;
- (c) retain an appropriate batch retention sample program and maintain such batch sample, which

must replicate the standard at which the Produce will be kept; and

- (d) send future Produce via MBM preferred logistics/warehouse provider for QA checks prior to being sent to any Customers, if the Produce has been previously rejected by MBM. This will continue until MBM is satisfied the issues affecting quality have been resolved.

10.11. MBM will provide secure and suitable off-loading facilities at the Delivery Address so as to facilitate the safe and timely off-loading of the Produce. Subject to clause 6.2, MBM will be responsible for the off-loading of the Produce.

10.12. MBM will be responsible for giving, or taking reasonable steps to ensure that the Grower is given, a document evidencing receipt of delivered Produce.

11. Quality Requirements

Produce delivered by the Grower must meet the Quality Requirements.

12. Quantity Requirements

Produce delivered by the Grower must meet any Quantity Requirements.

13. Grower's obligations

13.1. The Grower is taking and will continue to take all steps in its business to protect fundamental human rights and values in the workplace, including business policies to ensure:

- (a) strict compliance with applicable laws;
- (b) a safe and clean workplace;
- (c) fair terms of employment with no discrimination or forced labour;
- (d) no underage workers; and
- (e) no physical punishment.

13.2. The Grower hereby irrevocably grants MBM the right to enter and inspect the Grower's premises and property to undertake an assessment

of the Grower's business and workplace systems to ensure the Produce is being grown, harvested, packed and delivered by the Grower in a socially responsible manner consistent with clause 13.1.

13.3. The Grower must:

- (a) grow, harvest, pack and dispatch, or procure the growing, harvesting, packing and dispatching of the Produce delivered by the Grower to MBM using Best Practice;
- (b) maintain product liability insurance for a sum of not less than \$10,000,000 per individual claim;
- (c) maintain an HACCP accreditation or any extended HACCP verification or equivalent food safety programme verification which is, or becomes, a Customer requirement;
- (d) ensure any third party packer used by the Grower maintains an HACCP accreditation or any extended HACCP verification or equivalent food safety programme verification which is, or becomes, a Customer requirement (eg Woolworths Quality Assurance and Safe Quality Food Institute);
- (e) maintain an ICA accreditation applicable to the crop if sending to a state that requires it.
- (f) immediately notify MBM of any circumstances which could lead to a loss of the accreditations or verifications referred to in clauses 13.3(c) to 13.3(e), inclusive;
- (g) ensure Produce delivered by Grower to MBM is of merchantable quality and fit for its intended purpose; and
- (h) pay any Return Freight Costs.
- (i) comply with the National Measurement Act with respect to the Produce.
- (j) be certified to :
 - 1) Fresh Care Code of Practice Food Safety and Quality; or
 - 2) Global G.A.P Integrated Farm Assurance; or
 - 3) Safe Quality Food (SQF).
- (k) If the Grower supplies produce (in final retail packaging) destined for a HARPS participating retailer, they are also required to have HARPS certification in addition to a base level certification in point 13.3(i)
- (l) If the grower supplies produce (in final retail packaging), then the grower must be registered with an Ethical Sourcing / Employment certification and audited, which is recognised by Major retailers (defined as Coles, Woolworths, Aldi and Costco). The frequency of this audit is determined by the company you are getting audited by and the risk rating attached to your business from the audit.
- (m) The two ethical sourcing / employment programs that are currently accepted by Major Retailer are Sedex and Fair Farms.

14. Rejection of Produce

14.1. MBM will accept all Produce delivered to the Delivery Address unless rejected by MBM.

14.2. MBM may only reject Produce if:

- (a) the Grower does not have title free from any encumbrance in the Produce; or
- (b) the Produce cannot be lawfully sold;
- (c) the Produce is not insured by the Grower as required by this Agreement;
- (d) the Grower or any third party packer used by the Grower ceases to hold an industry compliant hazard analysis and critical control points based quality assurance programme, which satisfies all Customer requirements (**HACCP**), accreditation or any extended HACCP verification or equivalent food safety programme verification which is, or becomes, a Customer requirement (eg Woolworths Quality Assurance and Safe Quality Food Institute);
- (e) the Grower ceases to hold Interstate Certification Assurance (**ICA**) accreditation;

- (f) the Grower is in breach of clauses 13.1 or 13.2;
- (g) it does not meet the Quality Requirements; or
- (h) the Produce is not delivered in accordance with this Agreement.

14.3. MBM must advise the Grower of any Produce the Grower has delivered which MBM rejects within 24 hours of the Produce being rejected.

14.4. If MBM rejects any Produce the Grower has delivered, it must notify the Grower in writing of the rejection, and the reasons for rejection, within two Business Days.

15. Produce Pooling

15.1. If Produce Pooling is specified as being allowed in the Commercial Terms, MBM may pool Produce delivered by the Grower under this Agreement with other produce if:

- (a) the other produce is of the same type and quality; and
- (b) the Produce and the other produce meet the Quality Requirements.

15.2. Where MBM pools Produce with other produce (**Pooled Produce**), the Gross Wholesale Return will be deemed to be that proportion of the total gross invoiced amount received by MBM for the Pooled Produce that was contributed by the Grower.

16. Title

16.1. The Grower warrants it has title free from any encumbrance in the Produce it delivers to the Delivery Address.

16.2. Title and risk in the Produce does not pass to MBM and remains with the Grower until MBM sells the Produce to a Customer.

17. Insurance

17.1. If MBM is specified as holding insurance in the Commercial Terms, MBM must insure Produce delivered to the Delivery Address by the Grower under MBM's control in the name of

the insurer and to the extent specified in the Commercial Terms.

18. Bad Debt

18.1. Risk in relation to any Bad Debt rests with the Grower.

18.2. Subject to clause 18.3, MBM will, however, pursue payment for any Bad Debt arising under this Agreement on the following basis:

- (a) MBM will pursue any Bad Debt for 60 days from date of invoice; and
- (b) MBM will pursue payment of any Bad Debt provided that the Bad Debt is greater than \$1000.

18.3. MBM will not be required to:

- (a) initiate any legal proceedings for recovery of any Bad Debt;
- (b) incur any third party expenses (eg legal fees) for recovery of any Bad Debt;
- (c) subject to clause 18.4, assist the Grower with recovery of any Bad Debt;
- (d) contribute to the cost of any legal proceedings in connection with the recovery of any Bad Debt initiated by or on behalf of the Grower; and
- (e) contribute to any third party expenses (eg legal fees) incurred by or on behalf of the Grower in connection with the recovery of any Bad Debt.

18.4. MBM must, if requested by the Grower, provide the Grower with all information requested by the Grower for the purpose of recovering any Bad Debt.

18.5. No Marketing Fee shall be payable by the Grower in respect of any Bad Debt arising under this Agreement.

19. Intellectual Property Rights

19.1. Each party acknowledges it has no claim or interest in respect of any Intellectual Property Rights owned, licensed or used by the other party.

19.2. Subject to clause 19.3, the Grower must use branding provided by MBM

in relation to Produce delivered by the Grower.

19.3. The Grower may use the Produce Branding in relation to the Produce varieties and geographical areas specified in the Commercial Terms.

20. Confidentiality

20.1. Each party must:

- (a) keep confidential, and take all steps necessary to safeguard the confidentiality of, the other party's Confidential Information; and
- (b) use the other party's Confidential Information only for the purpose of performing the party's obligations under this Agreement.

20.2. A party will not be in breach of clause 20.1 where the party discloses the other party's Confidential Information to:

- (a) the party's Associates, solicitors, auditors, insurers, accountants or other professional advisers, or financiers, on substantially the same terms as clause 20.1;
- (b) a prospective purchaser of the party, or its assets or shares, on substantially the same terms as clause 20.1; and
- (c) the extent required for a party to give effect to its rights and/or obtain remedies in connection with this Agreement.

20.3. A party will not be in breach of clause 20.1 where the party is legally compelled, or required by the rules of any recognised stock exchange, to disclose any or all of the other party's Confidential Information, provided that:

- (a) before making any such disclosure, to the extent legally possible, the party notifies the other party and provides the other party with a reasonable opportunity to take any steps the other party considers appropriate to protect the confidentiality of the information; and

- (b) any such disclosure is no more than the minimum required for the party to comply with its obligations.

21. Limitation of liability

21.1. Notwithstanding any other clause of this Agreement to the contrary, to the maximum extent permitted by law, each party's total aggregate liability to the other party arising out of or in connection with this Agreement is limited to an amount equal to the total amount paid to that party under this Agreement.

21.2. Notwithstanding any other clause of this Agreement to the contrary, to the maximum extent permitted by law, neither party shall be liable to the other party for any loss of profits, opportunity, goodwill or anticipatory profits or loss related to business interruption or indirect or consequential loss.

22. Dispute resolution

22.1. If there is a dispute under this Agreement or the Code (**Dispute**), each party should contact the other party's representative named in the Commercial Terms.

22.2. A party will not commence arbitration or court proceedings (except proceedings seeking interlocutory relief), or any other proceedings in respect of a Dispute, unless that party has used reasonable endeavours to comply with this clause.

22.3. A party complaining about a Dispute (**Complainant**) must notify the other party (**Respondent**) of:

- (c) the nature of the Dispute;
- (d) what outcome the Complainant wants; and
- (e) what action the Complainant thinks will settle the Dispute (**Notice of Dispute**).

22.4. Once a Notice of Dispute has been given, the parties will use their reasonable endeavours to agree about how to resolve the Dispute

22.5. If the parties cannot agree about how to resolve the Dispute within 14 Business Days of the Notice of Dispute being given, either party may refer the Dispute to a mediator agreed by the parties or, if the parties cannot agree about who should be the mediator within 21 Business Days of the Notice of Dispute being given, either party may ask the President of the Law Society of New South Wales (**Appointor**) to appoint a mediator.

22.6. If any fee is payable to the Appointor for appointing the mediator, it is payable by the party requesting the mediator's appointment.

22.7. Unless agreed otherwise, the mediator's fees and charges are payable by the party requesting the mediator's appointment.

22.8. The role of any mediator is to assist the parties in negotiating a resolution of the Dispute. A decision of a mediator is not binding on the parties.

22.9. The mediator may decide the time and place for mediation, provided that the place for mediation is within New South Wales.

22.10. The parties will attend the mediation and use their reasonable endeavours to resolve the Dispute.

22.11. A party is taken to attend mediation if that party is represented at the mediation by a person who has the authority to enter into an agreement to settle the Dispute on behalf of that party.

22.12. If at least one Business Day has elapsed since mediation commenced and the Dispute has not been finally resolved, either party may ask the mediator to terminate the mediation and the mediator will do so.

23. Force Majeure

23.1. Subject to the provisions of clause 23.4, no party will have any obligation to observe or comply with the terms of this Agreement to the extent that the observance of, or compliance with,

those terms is prevented by Force Majeure.

23.2. A party claiming the benefit or protection of clause 23.1 must at its own cost:

(a) promptly give notice to the other party, as soon as it becomes aware of the Force Majeure, of the occurrence and circumstances in respect of which the claim arises;

(b) take all reasonable steps to ameliorate and remedy the consequences of that occurrence without delay and give the other party on request details of the steps that have been taken or are to be taken; and

(c) resume performance in full of its obligations under this Agreement as soon as reasonably practicable and give the other party notice as soon as it is able to resume performance of its obligations.

23.3. If a party is unable to observe or comply with the terms of this Agreement due to Force Majeure and it does not resume performance of its obligations within 90 days after that Force Majeure arose, then the other party may terminate this Agreement by notice in writing to the other party.

23.4. Force Majeure in no way impacts the obligation of a party to pay any monies owing to another party in accordance with the terms of this Agreement.

24. Termination

24.1. Subject to subclause 24.2, 24.3 or 24.4, this agreement can be terminated by either party giving four (4) weeks' written notice of termination to the other party.

24.2. Either party may terminate this Agreement with immediate effect by giving notice in writing to the other party, if:

- (d) the other party is in material breach of this Agreement such that the breach cannot be remedied;
 - (e) the other party is in breach of this Agreement and fails to remedy the breach within 30 days of receiving written notice of the breach; or
 - (f) an Insolvency Event happens to the other party.
- 24.3. MBM may terminate this Agreement with immediate effect by giving notice in writing to the Grower, if:
- (a) the Produce is not insured by the Grower as required by this Agreement;
 - (b) the Grower or any third party packer used by the Grower ceases to hold an HACCP accreditation or any extended HACCP verification or equivalent food safety programme verification which is, or becomes, a Customer requirement (eg Woolworths Quality Assurance and Safe Quality Food Institute);
 - (c) the Grower ceases to hold ICA accreditation;
 - (d) the Grower is in breach of clauses 13.1 or 13.2.
- 24.4. 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 notice in writing to the other party during the Cooling-off Period.
- 24.5. Expiration or termination of this Agreement does not affect:
- (a) any rights of the parties which may have accrued before the date of termination; or
 - (a) the rights and obligations of the parties which survive termination or expiry of this Agreement.
- 24.6. Upon termination or expiry of this Agreement for any reason, each party must return to the other party all Confidential Information and any intellectual property of the other party, or if not capable of return, destroy it and certify its destruction to the other party.

24.7. Where this Agreement is terminated pursuant to this clause 24, any trade that has occurred under this Agreement before the termination is governed by the terms of this Agreement.

24.8. If MBM possesses or controls any Produce delivered by the Grower upon termination of this Agreement, MBM will return the Produce to the Grower (at the Grower's expense), unless the Grower instructs MBM to destroy the Produce before MBM returns the Produce.

25. Goods and Services Tax

25.1. Interpretation

In this clause 25, a word or expression defined in the GST Act has the meaning given to it in the GST Act.

25.2. GST Gross Up

If a party makes a taxable supply under or in connection with this Agreement, then the amount payable by the recipient of the supply to the supplier of the supply is equal to the consideration for the supply (less any GST payable on the supply) (the GST exclusive consideration) increased by an amount calculated by multiplying the GST exclusive consideration by the rate of GST prevailing at the time the supply is made.

25.3. Reimbursement

If a party must reimburse or indemnify another party for a loss, cost or expense, the amount to be reimbursed or indemnified is first reduced by any input tax credit the other party is entitled to for the loss, cost or expense, and then is increased in accordance with clause 25.2.

25.4. Tax Invoice

A party need not make a payment for a taxable supply made under or in connection with this Agreement until it receives a tax invoice for the supply to which the payment relates.

26. Variation and Changes in Arrangements

The Agreement may only be varied by written agreement between the parties.

27. Miscellaneous

27.1. Interpretation

In this Agreement, the terms in the Commercial Terms have the meaning as set out in the Commercial Terms.

27.2. Legal Advice

Each of the parties acknowledge that they have had the opportunity to seek legal advice in respect of this Agreement and they have read and understood the terms of this Agreement.

27.3. Notices

- (a) A notice under this Agreement may be given by any electronic means, including by email, but must be given to the address details stated in the Grower's or MBM's details (as applicable) in the Commercial Terms.
- (b) Notice given in accordance with 27.3(a) takes effect when received (or at a later time specified in it), and is taken to be received:
 - I. if hand delivered, on delivery;
 - II. if sent by prepaid post, 3 Business Days after the date of posting (or seven Business Days after the date of posting if posted to or from outside Australia);
 - III. if sent by email, when the sender's email system confirms successful delivery of the notice to the recipient's server,

but if the delivery or receipt is not on a Business Day or is after 5pm on a Business Day, the notice is taken to be received at 9am on the Business Day after that delivery or receipt.

27.4. Assignment

No party can assign, charge, encumber or otherwise deal with any rights or obligations under this Agreement, or

attempt or purport to do so, without the prior written consent of the other party, which shall not be unreasonably withheld or delayed.

27.5. Costs

Each party must pay its own costs of negotiating, preparing and executing this Agreement.

27.6. Counterparts

This Agreement may be executed in counterparts. All executed counterparts constitute one document.

27.7. No Merger

The rights and obligations of the parties under this Agreement do not merge on completion of any transaction or matter contemplated by this Agreement and are additional to any right, power or remedy which they may have under general law or otherwise.

27.8. Entire Agreement

This Agreement constitutes the entire agreement between the parties in relation to its subject matter and supersedes any previous arrangements between the parties in relation to that subject matter. The only enforceable obligations and liabilities of the parties in relation to the subject matter of this Agreement are those expressed in this Agreement.

27.9. Further Action

Each party must do, at its own expense, everything reasonably necessary (including executing documents) to give full effect to this Agreement and the transactions or matters contemplated by it.

27.10. Severability

A clause or part of a clause of this Agreement that is void, illegal or unenforceable may be severed from this Agreement and the remaining clauses or parts of the clause of this Agreement continue in force.

27.11. Waiver

A party does not waive a right, power or remedy if it fails to exercise or delays in

exercising the right, power or remedy. A single or partial exercise of a right, power or remedy does not prevent another or further exercise of that or another right, power or remedy. A waiver of a right, power or remedy must be in writing and signed by the party giving the waiver.

27.12. Good Faith

Each party must deal with the other party in good faith.

27.13. Cumulative Rights

The rights, powers and remedies of the parties under this Agreement are cumulative and do not exclude any other rights, powers or remedies provided by law independently of this Agreement.

27.14. Governing Law and Jurisdiction

This Agreement is governed by the laws of New South Wales and each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of New South Wales.

28. Definitions

28.1. Definitions

In this Agreement:

Agreement means this horticulture produce agreement comprising the Commercial Terms and Legal Terms;

Appointor has the meaning given to that term in clause 22.5;

Associate means:

- (a) in respect of a body corporate, a director, secretary, shareholder or a Related Body Corporate;
- (b) a director, secretary or shareholder of a Related Body Corporate;
- (c) a trustee of any trust under which any of the persons described in clause(a) above and/or clause (b) above may benefit; and
- (d) a person with whom the body corporate is acting, or proposes to act, in concert or is, or proposes to become, associated, whether formally or informally, in any other way.

Bad Debt means a bad debt of the Grower and is an amount owed by a Customer where:

- (e) MBM arranges for the person to buy the Produce of the Grower; and
- (f) the Customer does not pay MBM for some or all of the Produce by the time that payment is required for the Produce;

Best Practice means highest standard horticultural, environmental and industry practices for growing, harvesting, packing and distributing the Produce;

Business Day means a day on which banks are open for general banking business in New South Wales other than a Saturday, Sunday or public holiday;

Code means the Horticulture Code of Conduct prescribed as a mandatory industry code for the purpose of section 51AE of the *Competition and Consumer Act 2010 (Cth)* by the *Competition and Consumer (Industry Codes–Horticulture) Regulations 2017 (Cth)*, as amended from time to time;

Complainant has the meaning given to that term in clause 22.3;

Confidential Information means all information of a party, whether or not in a material form, disclosed to the other party, but excluding information to the extent it has become common knowledge, or come to the other party's knowledge, other than through disclosure in breach of this Agreement;

Consignment Note has the meaning given to that term in clause 10.7;

Consignment Week means a period commencing on a Saturday and ending the immediately following Friday during which the Grower has delivered Produce to MBM for sale to Customers;

Corporations Act means the *Corporations Act 2001 (Cth)*;

Customer means a purchaser of Produce;

Delivery Direction has the meaning given to that term in clause 10.5;

Delivery Docket has the meaning given to that term in clause 10.8;

Direct Delivery has the meaning given to that term in clause 10.8;

Dispute has the meaning given to that term in clause 22.1;

Force Majeure means a circumstance beyond the reasonable control of a party which results in the party being unable to observe or perform on time an obligation under this Agreement, including:

- (a) acts of God, lightning strikes, earthquakes, floods, storms, explosions, fires, any natural disaster or weather event;
- (b) acts of war, acts of public enemies, terrorism, riots, civil commotion, malicious damage, sabotage and revolution; and
- (c) strikes;

Gross Wholesale Return means the actual gross amount invoiced by MBM on behalf of the Grower to Customers for the Grower's Produce before the deduction of any Marketing Fee and Other Costs;

GST Act means *A New Tax System (Goods and Services Tax) Act 1999 (Cth)*;

HACCP has the meaning given to that term in clause 14.2(d);

ICA has the meaning given to that term in clause 14.2(e);

Insolvency Event includes:

- (a) the party becoming insolvent within the meaning of section 95A of the Corporations Act;
- (b) the party ceasing to carry on its business, ceasing to be able to pay its debts as they become due or suspending payment generally, or threatening to cease to carry on its business or to pay its debts;
- (c) a meeting being convened, resolution proposed, petition presented or order made for the winding up of the party;
- (d) any step being taken to appoint a receiver, receiver and manager, provisional liquidator, liquidator, administrator or other like person in relation to all or any material asset of the party;
- (e) the party disposing of the whole or a substantial part of its assets, operations or business, other than in the ordinary course of business;

(f) a mortgagee or chargee taking, attempting, or indicating an intention to exercise its rights under any security of which the party is the mortgagor or chargor; or

(g) any step being taken by the party to enter into any arrangement with, or assignment for the benefit of, its creditors other than for the purposes of a bona fide scheme of solvent reconstruction or amalgamation;

Intellectual Property Rights includes all copyright, trade mark, design, patent, circuit layout and plant breeders' rights; trade, business, company and domain names; rights to have information kept confidential; other similar proprietary rights however described; and rights to registration of such rights existing anywhere in the world, whether created before, on and/or after the date of this Agreement;

Month means calendar month;

Notice of Dispute has the meaning given to that term in clause 22.3;

Pooled Produce has the meaning given to that term in clause 15.2;

Primary Freight Cost has the meaning given to that term in clause 10.2;

Produce means the produce described in the Commercial Terms;

Produce Characteristics means details of any issues or characteristics relating to the Produce which may impact upon the shelf life or sale price, including a statement as to the quality (or designated "class") of the Produce and whether the Produce has been stored prior to delivery, dipped or 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;

Related Body Corporate has the meaning given to that term in the Corporations Act;

Respondent has the meaning given to that term in clause 22.3;

Return Freight Cost means the cost of loading any rejected Produce, transporting any rejected Produce from the Delivery Address to the Grower and unloading the rejected Produce;

RPC means returnable plastic crates supplied by Customers or other third parties;

Sale Proceeds mean the Gross Wholesale Return less Marketing Fee and Other Costs; and

Statement has the meaning given to that term in clause 4.1.