

GROWER TERMS OF TRADE

OF
EVERED NOMINEES PTY LTD ACN 098 314 302
T/A MERCER MOONEY
EFFECTIVE ON AND FROM 25 NOVEMBER 2011

DEFINITIONS

In these Grower Terms of Trade (**Terms**) and our standard form of Horticultural Produce Agreement (**HPA**):

"Business Day" means a day that is not a Saturday, Sunday or a public holiday in Perth, Western Australia;

"Business Requirements" means the written requirements and specifications regarding Produce quality, shelf life and presentation provided by Mercer Mooney to the Supplier from time to time prior to the Purchase Price being set with respect to the Produce;

"Chamber Requirements" means Market Produce Specifications – FreshSpecs standards that may be published by the Australian Chamber of Fruit and Vegetable Industries from time to time;

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

"Commencement Date" means the first date upon which the Supplier signs the HPA;

"Delivery" occurs when Produce is received and accepted by Mercer Mooney as being, in Mercer Mooney's reasonable opinion, acceptable for the purposes of immediately making the Produce available for re-sale by Mercer Mooney, and for the avoidance of doubt, delivery will not occur when one or more Non-Delivery Events occur;

"Details" means the details on the Schedule that appears on the front page of this agreement;

"GST" has the same meaning as that term in the GST Law;

"GST Law" means the A New Tax System (Goods and Services Tax) Act 1999 (Cth) and/or associated Commonwealth legislation, regulations and publicly available rulings.

"Inspection Certificate" means a report prepared by an independent authority or third party assessor who is qualified by experience and/or education to declare the Produce unfit for human consumption, unsuitable for sale or not meeting a particular specification or standard.

"Mercer Mooney" means Evered Nominees Pty Ltd ACN 098 314 302 trading as Mercer Mooney;

"Non-Delivery Event" means any of the following events:

- all or part of the Produce received is non-complying Produce pursuant to these Terms and HPA;
- the Produce is received at the premises of Mercer Mooney without Mercer Mooney voluntarily taking possession of the Produce (including, without limitation, the Produce being left in or near the premises of Mercer Mooney without Mercer Mooney's prior consent or knowledge); or
- the Produce is received by the Business (or a third party) as bailee under storage and warehousing arrangements.

"nursery products" has the meaning given to that term in the Code and includes:

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

"Order Form" means a Horticultural Produce Order Form substantially in the form of Attachment A to these Terms and submitted from time to time by Mercer Mooney or any nominee of Mercer Mooney to the Supplier;

"Person" shall include an incorporated body or other entity.

"Produce" means unprocessed:

- fruits
 - vegetables, including mushrooms and other edible fungi;
 - nuts;
 - herbs; and
 - other edible plants;
- but does not include nursery products.

"Purchase Order" means a written purchase order for Produce detailed in a form submitted from time to time by Mercer Mooney or any nominee of Mercer Mooney to the Supplier;

"Purchase Price" means the amount determined under clause 11.

"Statement" means the statement to be provided by Mercer Mooney under clause 15;

"Supplier" means any producer, grower or other Person who sends Produce to Mercer Mooney in accordance with these Terms and HPA.

"Tax Invoice" has the same meaning as that term has in the GST Law.

"Terms and HPA" means this document as amended from time to time and the Horticulture Produce Agreement executed with a particular Supplier.

"Week" means the period Saturday to Friday inclusive.

GENERAL

- Mercer Mooney will purchase Produce from the Supplier as a Merchant (as defined by the Code) for the purposes of the Code.
- These Terms and HPA are effective from the Commencement Date and apply to all transactions between Mercer Mooney and the Supplier on or after the Commencement Date unless:
 - by specific written notice to the contrary; or
 - these Terms and HPA are replaced by another agreement at a later date; or
 - the transaction is not a transaction that would be covered by the Code.

The Supplier agrees that these Terms and HPA can be accepted by the Supplier signing the HPA and returning it to Mercer Mooney by fax, email or post.

- The terms of any Order Form or Purchase Order shall form part of this agreement, provided that the Terms and HPA shall prevail over the terms of any Order Form or Purchase Order to the extent of any inconsistency. In the event that the Supplier provides Produce pursuant to an Order Form or Purchase Order prior to the Supplier having agreed to these Terms and HPA, then these Terms and HPA shall, notwithstanding, apply to any Produce supplied by the Supplier pursuant to that Order Form or Purchase Order.
- Mercer Mooney will purchase the Produce specified in the Order Form from the Supplier and following the purchase by Mercer Mooney resell, dispose of, or otherwise deal with the Produce at the discretion of Mercer Mooney.
- For the avoidance of doubt, Mercer Mooney is not:
 - required to buy a minimum quantity of Produce from the Supplier, unless expressly specified in these Terms and HPA or otherwise agreed in writing between Mercer Mooney and the Supplier; or
 - prevented from buying goods of the same or similar nature as the Produce from any person other than the Supplier.

TRANSFER OF TITLE AND RISK

- The parties acknowledge that despite the Delivery of Produce to Mercer Mooney under these Terms and HPA, title and risk in respect of the Produce shall only pass in accordance with clauses 7 and 8.
- Subject to clauses 31, 36 and 37, title to the Produce will be deemed to have passed to Mercer Mooney as follows:
 - if the Purchase Price of the Produce has been agreed to by the Supplier signing an Order Form or orally confirming acceptance of the price stated on the Order Form before Delivery of the Produce to Mercer Mooney, title to the Produce will pass on Delivery of the Produce to Mercer Mooney; or
 - if the Purchase Price of the Produce has not been agreed to in accordance with clause 7(a) before

Delivery, title to the Produce will pass at the time that Mercer Mooney and the Supplier agree on the Purchase Price for the Produce.

- (8) The Supplier warrants to Mercer Mooney that the Supplier is the grower (as defined by the Code) of the Produce and has all right, title and interest in and to the Produce and that title will pass to Mercer Mooney clear of all encumbrances, claims and other third party interests.
- (9) Subject to clauses 31, 36 and 37, Mercer Mooney will assume risk in respect of the Produce once title to the Produce passes to Mercer Mooney under clauses 7 and 8.
- (10) Mercer Mooney shall not be obliged to keep insurances in respect of Produce in its legal and physical control. If Mercer Mooney does have insurance, Mercer Mooney' insurer, the maximum amount of claims covered by Mercer Mooney' insurance and the defined events covered including fire, theft and accidental damage and other deterioration and/or inherent loss of any kind (Insurance), is set out in the Details. Mercer Mooney will not be liable for loss or damage to any part or the whole of the Produce arising from any cause or event outside of the control of Mercer Mooney. If the details of Insurance in the Details are blank, Mercer Mooney does not hold Insurance. Any insurance held by Mercer Mooney is held for the sole benefit of Mercer Mooney and does not confer any benefits on the Supplier.

PRICE DETERMINATION

- (11) The Purchase Price for Produce shall be determined as:
 - a. specified in the Order Form, and accepted by the Supplier signing the Order Form or orally confirming acceptance of the Order Form to Mercer Mooney; or
 - b. by any other arrangement agreed to in writing between the parties provided that the parties must agree to the Purchase Price no later than upon Delivery of the Produce to Mercer Mooney.

The Supplier agrees that upon the Supplier accepting an Order Form, such Order Form cannot be cancelled or withdrawn by the Supplier and the Supplier indemnifies Mercer Mooney for any losses (including indirect or consequential loss) suffered or incurred as a result of the Supplier failing to provide the Produce in the quantities and otherwise in the manner referred to in any Order Form as accepted by the Supplier.

- (12) Mercer Mooney shall not be liable in respect of any claim by the Supplier where such claim is not received in writing within five (5) Business Days from issue of the Statement in relation to the Produce.

PAYMENTS AND OBLIGATIONS

- (13) Payment for the Produce accepted by Mercer Mooney upon Delivery to Mercer Mooney will be made as follows:
 - a. no later than 45 days from the end of the Week during which the relevant Produce is received and accepted by Mercer Mooney, or as otherwise set out in any Order Form; and
 - b. such payments shall be made by Mercer Mooney or its nominee as it may direct from time to time, by cheque or direct bank deposit, to the credit of the Supplier as specified in writing by the Supplier from time to time.
- (14) The Supplier is responsible for all transport and other costs incurred in shipping the Produce to Mercer Mooney and will not be reimbursed by Mercer Mooney for such costs unless specifically provided for in writing between Mercer Mooney and the Supplier. Mercer Mooney is authorised by the Supplier to deduct from payments to the Supplier:
 - a. any payments made at the request of or on behalf of the Supplier where Mercer Mooney has agreed to make such payments (e.g. transport/unloading/packaging);
 - b. levies and fees for service payable under State, Territory or Commonwealth legislation or rules or any voluntary arrangement;
 - c. GST in respect of any item for which a Tax Invoice has been issued.

Mercer Mooney will not charge the Supplier a fee, commission or other amount for services performed by Mercer Mooney other than as set out in any service

agreement between the parties relating to services not covered by the Code.

- (15) Mercer Mooney will provide a Statement for each period of not more than six (6) months for the term of these Terms and HPA to the Supplier containing the following details in support of payments made to the Supplier:
 - a. Supplier's reference or shipping note number;
 - b. the Produce received in the period;
 - c. description including quality of the Produce purchased;
 - d. details of the quantity of the Produce purchased;
 - e. the date or dates of purchases of Produce;
 - f. the Purchase Price for the Produce;
 - g. the time of Delivery of the Produce to Mercer Mooney;
 - h. details of any non-complying Produce that is disposed of, or otherwise dealt with, in accordance with these Terms and HPA;
 - i. a copy of any relevant Inspection Certificate obtained in accordance with these Terms and HPA; and
 - j. details of all levies, fees and taxes deducted from the Supplier under these Terms and HPA.

The Statement referred to in this clause 15 will be provided to the Supplier within two (2) months of expiry of the relevant period.

- (16) Mercer Mooney will issue a Tax Invoice to the Supplier in respect of any item for which GST is chargeable.

NON-DELIVERY EVENTS

- (17) If the Produce received by Mercer Mooney at any time is not yet in a saleable state (in the sole opinion of Mercer Mooney or its nominee acting reasonably), Delivery will be deemed not to have occurred until the Produce has reached a saleable state (in the sole opinion of Mercer Mooney or its nominee acting reasonably) and Mercer Mooney is able to determine whether such Produce complies with the Business Requirements and, if required by Mercer Mooney, Chamber Requirements.
- (18) Where a Non-Delivery Event has occurred, Delivery will be deemed to subsequently occur, upon Mercer Mooney:
 - a. receiving and accepting the Produce; or
 - b. voluntarily changing the nature of its possession of the Produce such that it is held, for the purpose of immediately making the Produce available for re-sale by Mercer Mooney.

SUPPLIER OBLIGATIONS

- (19) The Supplier must deliver the Produce at the time and location specified in the relevant Order Form or otherwise as specified by Mercer Mooney from time to time.
- (20) Prior to Delivery, the Supplier must provide documentation that is suitable to Mercer Mooney that accurately describes the quantity, variety, size, class, description and characteristics of the Produce, including containers.
- (21) The Supplier warrants to Mercer Mooney that the Produce provided to Mercer Mooney is fit for human consumption and complies with any statutory regulations including without limitation food safety, packaging and/or labelling.
- (22) The Supplier warrants that the Produce is fit for purpose and complies with the Business Requirements, and with the Chamber Requirements where the Chamber Requirements are not inconsistent with the Business Requirements.
- (23) The Supplier warrants to Mercer Mooney that the Supplier has complied with all applicable laws with respect to the Produce.
- (24) The Supplier must not dispatch Produce to Mercer Mooney that does not comply with the requirements in clauses 19 to 23 (both inclusive) and/or that has not been ordered by Mercer Mooney. In the event that Produce is received by Mercer Mooney which has not been ordered by Mercer Mooney or is in excess of the quantity as specified by Mercer Mooney, Mercer Mooney may in its sole discretion either:
 - a. treat the Produce as non-complying Produce and deal with it pursuant to clauses 29 to 35 (both inclusive) of these Terms and HPA; or
 - b. enter into a separate agreement with the Supplier to determine the key terms and conditions (including but not limited to the Purchase Price) relating to the

excess Produce. Any such agreement shall comply with the requirements of the Code.

- (25) The Supplier must implement and maintain an industry recognised HACCP based food safety and quality system that is subject to an annual third party audit. Copies of any current certification must be sent to Mercer Mooney upon demand by Mercer Mooney from time to time.
- (26) The Supplier must provide Mercer Mooney with the Supplier's registered Australian Business Number (ABN) prior to any payment being made by Mercer Mooney to the Supplier.
- (27) Deleted.

COMPLYING AND NON-COMPLYING PRODUCE

- (28) The Supplier must ensure that the Produce supplied to Mercer Mooney complies with clauses 8 and clauses 19 to 22 (both inclusive) or that Produce will be treated as non-complying Produce.
- (29) Without limiting clause 28, Produce will also be treated as non-complying Produce, and Mercer Mooney is entitled to reject all or some of the Produce supplied by the Supplier to Mercer Mooney, where Mercer Mooney determines that the Produce is non-complying produce for any one or more of the following reasons:
- the Supplier does not have all the right, title and interest in and to the Produce;
 - the Supplier cannot pass title to Mercer Mooney free and clear of all encumbrances, claims and other third party interests;
 - the Supplier is not the grower (as defined by the Code) of the Produce;
 - the Produce in whole or in part has not been solicited by Mercer Mooney.
- (30) Where these Terms and HPA provides that Produce is to be treated as non-complying Produce, then Mercer Mooney shall be entitled to, within two (2) Business Days of the later of:
- the Produce becoming treated under these Terms and HPA as non-complying Produce; or
 - receipt of the non-complying Produce by Mercer Mooney (whether or not Delivery has occurred),
- elect (the day the election is made being the **Non-Compliance Day**) to:
- reject all of the Produce;
 - accept all of the Produce; or
 - accept part of the Produce and reject the balance of the Produce.

- (31) Where Produce is rejected, Mercer Mooney is deemed not to have purchased, taken ownership of or taken Delivery of that Produce. The Supplier retains the title and risk for rejected Produce and is not entitled to the Purchase Price for rejected Produce.

- (32) Where Mercer Mooney elects to accept all or part of the Produce under these Terms and HPA, or fails to give a notice under these Terms to reject all or part of the Produce (both circumstances being **Accepted Produce**), then these Terms and HPA shall apply to require Mercer Mooney to deal with such Accepted Produce.

- (33) Where Mercer Mooney elects to reject all or part of the Produce under these Terms, Mercer Mooney will notify the Supplier as soon as possible and in any event within TWENTY FOUR (24) hours of the Non-Compliance Day in written or electronic format of the Produce being rejected and the reasons for the rejection to determine if the Supplier:
- wishes to take repossession of the Produce at the cost of the Supplier;
 - requires an independent inspection and assessment of the condition of the Produce to determine whether an Inspection Certificate should be issued at the Supplier's cost;
 - wishes to re-negotiate the Purchase Price; or
 - wishes to make other arrangements for the sale or resale of the Produce (including to instruct Mercer Mooney to sell it to a third party); or
 - its removal from Mercer Mooney' premises at the cost of the Supplier.

- (34) The Supplier authorises Mercer Mooney to destroy or dispose of the Produce at the discretion of Mercer Mooney if:

- the Supplier does not respond within TWENTY FOUR (24) hours of notification by Mercer Mooney in accordance with clause 33;
- the Supplier does respond within TWENTY FOUR (24) hours of notification in accordance with clause 33 but subsequently fails to retake possession of the Produce, or appoint an independent inspection, or remove the Produce from Mercer Mooney' premises or make other arrangements with Mercer Mooney for sale or resale of the Produce, within a further TWO (2) Business Days of the Supplier's response under clause 33; or
- no agreement to re-negotiate the Purchase Price has been reached with Mercer Mooney within THREE (3) Business Days of the Supplier's response under clause 33.

- (35) Where clause 34 applies:

- any destruction and/or disposal of Produce is at the Supplier's expense.
- Deleted.

RETURNS OF PRODUCE

- (36) The Supplier agrees that despite the sale of Produce to a third party where Mercer Mooney has not prior determined that the Produce is non-complying Produce pursuant to these Terms and HPA, if such third party makes a claim to Mercer Mooney following the sale to the third party of such Produce, which is accepted by Mercer Mooney, and where such claim is due to the Produce being (in the opinion of such third party) non-complying Produce (for any one or more reason set out under clauses 8, 19 to 23 (both inclusive) (a "**Return**" of Produce), any claims for credit from Mercer Mooney may be deducted (after allowing for the new Purchase Price for some or all of the Produce which may be payable to the Supplier as agreed by Mercer Mooney and the Supplier in the event that Delivery of such Produce occurs after the Return) from the amounts payable by Mercer Mooney to the Supplier within TWO (2) Business Days from receipt of such claim request.

- (37) Produce Returned under clause 36 will be treated as non-complying Produce under these Terms and HPA.

- (38) The Supplier acknowledges that any amount deducted under clause 36 represents a genuine pre-estimate of Mercer Mooney' loss as a result of the Produce not complying with any one or more of clauses 8 and clauses 19 to 23 (both inclusive) of these Terms and HPA.

- (39) The Supplier hereby indemnifies Mercer Mooney against all claims or losses that may be brought against or incurred or suffered by Mercer Mooney and which arise as a result of the Produce not complying with any one or more of clauses 8 and clauses 19 to 23 (both inclusive). For the avoidance of doubt, the Supplier acknowledges that clause 38 does not limit Mercer Mooney' rights under this clause 39.

DISPUTE RESOLUTION

- (40) In the case of a dispute that may arise under these Terms and HPA, Mercer Mooney undertakes to use the following to resolve the dispute:

- its internal Dispute Resolution Procedure as available to download at the website of its parent company www.moraitis.com.au; and/or
- the dispute resolution procedures under the Code; and/or
- in the case of a dispute relating to quality, the Chamber Requirements will apply as the benchmark standard for all Class 1 Produce.

At first instance, in the event of a dispute that may arise under these Terms and HPA, the Supplier may contact the person named as the Mercer Mooney contact in the Details, and if none is so named, the person named in the internal Dispute Resolution Procedure referred to in clause 40(a).

INDEPENDENT LEGAL ADVICE

(41) The Supplier warrants to Mercer Mooney that the Supplier has had the opportunity to seek independent legal advice in relation to these Terms and HPA prior to it being entered into between Mercer Mooney and the Supplier.

NO WAIVER

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

COSTS

(43) Unless otherwise expressly agreed by the parties in writing or in these Terms and HPA, each party must pay its own costs in connection with these Terms and HPA and the documents and transactions contemplated by these Terms and HPA.

GOVERNING LAW

(44) These Terms are governed by and are to be construed in accordance with the laws in force in the State of Western Australia. Each party submits to the non-exclusive jurisdiction of the Courts of Western Australia and to any Court which hears appeals from the Courts of Western Australia.

ENTIRE AGREEMENT

(45) These Terms and HPA, including the Details and any Order Form or Purchase Order, represent the entire agreement and understanding between Mercer Mooney and the Supplier and it is acknowledged that the Supplier has not relied on any other written or oral representation, arrangement, understanding or agreement not expressly provided.

SEVERANCE

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

VARYING THIS AGREEMENT

(47) These Terms and HPA can be varied by agreement in writing between Mercer Mooney and the Supplier, or by Mercer Mooney making publicly available a document that sets out the variations to its terms of trade and incorporates the variations into these Terms and HPA. Mercer Mooney will make all reasonable efforts to notify the Supplier of any such variation. If the Supplier continues to provide Produce after Mercer Mooney makes such document publicly available, or accepts any Order Form or Purchase Order issued by Mercer Mooney after the date of making such document publicly available, the Supplier will be deemed to have accepted these Terms and HPA as so amended.

TERMINATING THIS AGREEMENT

(48) Despite anything else in these Terms and HPA, these Terms and HPA may be terminated by either Mercer Mooney or the Supplier within the cooling-off period under the Code, and in such event:

- a. clause 51 shall apply; and
- b. any payment of money or other valuable consideration, that was made for the purposes of, and directly related to, a purchase of Produce by Mercer Mooney that would have occurred after the Termination Notice (**Trade**), must be returned to the party who made the payment within 14 days of the Termination Notice (less reasonable expenses incurred under these Terms and HPA for the purpose of, and directly relating to, the Trade).

TERM

(49) Subject to clause 48, unless terminated earlier pursuant to clause 50, the term of the agreement constituted by these Terms and HPA commences on the Commencement Date and will continue until the expiry of 7 days written notice by either Mercer Mooney or the Supplier.

(50) The Supplier or Mercer Mooney may terminate the agreement constituted by these Terms and HPA with immediate effect by serving written notice on the other of

those parties if:

- a. the other of those parties becomes unable to lawfully perform these Terms and HPA;
- b. an insolvency event happens to the other party; or
- c. (subject to section 15 of the Code) the other party breaches these Terms and HPA and fails to remedy such breach within TEN (10) days after receiving written notice from the terminating party specifying the breach and setting out the steps required to be taken in order to remedy the breach.

(51) Any termination of the agreement constituted by these Terms and HPA:

- a. except where clause 48 applies – shall apply prospectively to prevent any despatch of Produce by the Supplier under these Terms and HPA after the Termination Notice but shall not apply to any Produce despatched by the Supplier (whether or not Delivery has occurred) before the Termination Notice; and
- b. where clause 48 applies – shall apply prospectively to prevent any purchase of Produce by Mercer Mooney under these Terms and HPA after the Termination Notice but shall not apply to any Produce purchased by Mercer Mooney before the Termination Notice; and
- c. will not affect any accrued rights or obligations of Mercer Mooney or the Supplier prior to the Termination Notice.

INCONSISTENCY

(52) To the extent that any provision of these Terms and HPA are inconsistent with the Code, the provisions of the Code shall prevail to the extent of the inconsistency.

Horticultural Produce Order Form

<i>Mercer Mooney:</i>	Name Evered Nominees Pty Ltd t/a Mercer Mooney Address Market City, 280 Bannister Road Canning Vale WA 6155 Contact Name: Contact phone number: Contact fax number:	ABN 92 098 314 302			
<i>Mercer Mooney is:</i>	a Merchant for the purposes of the <i>Horticulture Code of Conduct) Regulations 2006</i>				
<i>Supplier:</i>	Name Address Contact	ABN Phone Fax Vendor No.			
<i>Supplier is:</i>	<input type="checkbox"/> Company <input type="checkbox"/> Individual <input type="checkbox"/> Partnership <input type="checkbox"/> Other (describe)				
<i>Produce: If insufficient room, please use additional page.</i>					
	Produce Description	Quantity	Net Price	GST	Total
<i>Produce to be delivered to:</i>	Address	Phone Fax			
<i>Delivery Date:</i>					
<i>Business Days until Payment after Delivery:</i>					

SUPPLIER ACCEPTANCE AND ACKNOWLEDGEMENT: I/We, being the Supplier named above, by signing below, hereby accept the price for the Produce set out above and acknowledge and agree that this document constitutes an Order Form under the Grower Terms of Trade and Horticultural Produce Agreement between Mercer Mooney and the Supplier regulated by the *Horticulture Code of Conduct*. I/We further acknowledge that the person/s signing below is duly authorised to sign this acceptance and acknowledgement on behalf of the Supplier.

Signed for and on behalf of the Supplier by its authorised representative in the presence of the witness: _____ Signature of Supplier _____ Print Name of Signatory Date of signing:
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