

# GROWER TERMS OF TRADE

OF

MORAITIS PTY LIMITED ACN 119 180 004  
MORAITIS FRESH PTY LIMITED ACN 071 791 369  
EFFECTIVE ON AND FROM 2 DECEMBER 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 the State in which the purchase transaction is completed;

**"Business Requirements"** means the written requirements and specifications regarding Produce quality, shelf life and presentation provided by Moraitis 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 Moraitis as being, in Moraitis' reasonable opinion, acceptable for the purposes of immediately making the Produce available for re-sale by Moraitis, 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;

**"Moraitis"** means either or both Moraitis Pty Limited ACN 119 180 004 and Moraitis Fresh Pty Limited ACN 071 791 369;

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

- (a) all or part of the Produce received is non-complying Produce pursuant to these Terms and HPA;
- (b) the Produce is received at the premises of Moraitis without Moraitis voluntarily taking possession of the Produce (including, without limitation, the Produce being left in or near the premises of Moraitis without Moraitis' prior consent or knowledge); or
- (c) 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:

- (a) trees, shrubs, plants, seeds, bulbs, corms and tubers (other than edible tubers);
- (b) propagating material and plant tissue cultures, grown for ornamental purposes or for producing fruits, vegetables, nuts or cut flowers and foliage; and
- (c) 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 Moraitis or any nominee of Moraitis to the Supplier;

**"Person"** shall include an incorporated body or other entity;

**"Produce"** means unprocessed:

- (d) fruits
  - (e) vegetables, including mushrooms and other edible fungi;
  - (f) nuts;
  - (g) herbs; and
  - (h) 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 Moraitis or any nominee of Moraitis to the Supplier;

**"Purchase Price"** means the amount determined under clause 11;

**"Statement"** means the statement to be provided by Moraitis under clause 15;

**"Supplier"** means any producer, grower or other Person who sends Produce to Moraitis 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; and

**"Week"** means the period Saturday to Friday inclusive.

## GENERAL

- (1) Moraitis will purchase Produce from the Supplier as a Merchant (as defined by the Code) for the purposes of the Code.
- (2) These Terms and HPA are effective from the Commencement Date and apply to all transactions between Moraitis and the Supplier on or after the Commencement Date unless:
  - a. by specific written notice to the contrary; or
  - b. these Terms and HPA are replaced by another agreement at a later date; or
  - c. 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 Moraitis by fax, email or post.

- (3) 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.
- (4) Moraitis will purchase the Produce specified in the Order Form from the Supplier and following the purchase by Moraitis resell, dispose of, or otherwise deal with the Produce at the discretion of Moraitis.
- (5) For the avoidance of doubt, Moraitis is not:
  - a. 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 Moraitis and the Supplier; or
  - b. 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

- (6) The parties acknowledge that despite the Delivery of Produce to Moraitis under these Terms and HPA, title and risk in respect of the Produce shall only pass in accordance with clauses 7 and 8.
- (7) Subject to clauses 31, 36 and 37, title to the Produce will be deemed to have passed to Moraitis as follows:
  - a. 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 Moraitis, title to the Produce will pass on Delivery of the Produce to Moraitis; or
  - b. 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 Moraitis and the Supplier agree on the Purchase Price for the Produce.

- (8) The Supplier warrants to Moraitis 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 Moraitis clear of all encumbrances, claims and other third party interests.
- (9) Subject to clauses 31, 36 and 37, Moraitis will assume risk in respect of the Produce once title to the Produce passes to Moraitis under clauses 7 and 8.
- (10) Moraitis shall not be obliged to keep insurances in respect of Produce in its legal and physical control. If Moraitis does have insurance, Moraitis' insurer, the maximum amount of claims covered by Moraitis' 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. Moraitis 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 Moraitis. If the details of Insurance in the Details are blank, Moraitis does not hold Insurance. Any insurance held by Moraitis is held for the sole benefit of Moraitis 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 Moraitis; 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 Moraitis.

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 Moraitis 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) Moraitis 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 Moraitis upon Delivery to Moraitis 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 Moraitis, or as otherwise set out in any Order Form; and
  - b. such payments shall be made by Moraitis 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 Moraitis and will not be reimbursed by Moraitis for such costs unless specifically provided for in writing between Moraitis and the Supplier. Moraitis 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 Moraitis 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.Moraitis will not charge the Supplier a fee, commission or other amount for services performed by Moraitis other than as set out in any service agreement between the parties relating to services not covered by the Code.
- (15) Moraitis 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 Moraitis;
- 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) Moraitis 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 Moraitis at any time is not yet in a saleable state (in the sole opinion of Moraitis 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 Moraitis or its nominee acting reasonably) and Moraitis is able to determine whether such Produce complies with the Business Requirements and, if required by Moraitis, Chamber Requirements.
- (18) Where a Non-Delivery Event has occurred, Delivery will be deemed to subsequently occur, upon Moraitis:
  - 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 Moraitis.

#### **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 Moraitis from time to time.
- (20) Prior to Delivery, the Supplier must provide documentation that is suitable to Moraitis that accurately describes the quantity, variety, size, class, description and characteristics of the Produce, including containers.
- (21) The Supplier warrants to Moraitis that the Produce provided to Moraitis 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 Moraitis that the Supplier has complied with all applicable laws with respect to the Produce.
- (24) The Supplier must not dispatch Produce to Moraitis that does not comply with the requirements in clauses 19 to 23 (both inclusive) and/or that has not been ordered by Moraitis. In the event that Produce is received by Moraitis which has not been ordered by Moraitis or is in excess of the quantity as specified by Moraitis, Moraitis 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 Moraitis upon demand by Moraitis from time to time.

(26) The Supplier must provide Moraitis with the Supplier's registered Australian Business Number (ABN) prior to any payment being made by Moraitis to the Supplier.

(27) Deleted.

#### **COMPLYING AND NON-COMPLYING PRODUCE**

(28) The Supplier must ensure that the Produce supplied to Moraitis 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 Moraitis is entitled to reject all or some of the Produce supplied by the Supplier to Moraitis, where Moraitis determines that the Produce is non-complying produce for any one or more of the following reasons:

- a. the Supplier does not have all the right, title and interest in and to the Produce;
- b. the Supplier cannot pass title to Moraitis free and clear of all encumbrances, claims and other third party interests;
- c. the Supplier is not the grower (as defined by the Code) of the Produce;
- d. the Produce in whole or in part has not been solicited by Moraitis.

(30) Where these Terms and HPA provides that Produce is to be treated as non-complying Produce, then Moraitis shall be entitled to, within two (2) Business Days of the later of:

- a. the Produce becoming treated under these Terms and HPA as non-complying Produce; or
- b. receipt of the non-complying Produce by Moraitis (whether or not Delivery has occurred),

elect (the day the election is made being the **Non-Compliance Day**) to:

- A. reject all of the Produce;
- B. accept all of the Produce; or
- C. accept part of the Produce and reject the balance of the Produce.

(31) Where Produce is rejected, Moraitis 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 Moraitis 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 Moraitis to deal with such Accepted Produce.

(33) Where Moraitis elects to reject all or part of the Produce under these Terms, Moraitis 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:

- a. wishes to take repossession of the Produce at the cost of the Supplier;
- b. 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;
- c. wishes to re-negotiate the Purchase Price; or
- d. wishes to make other arrangements for the sale or resale of the Produce (including to instruct Moraitis to sell it to a third party); or
- e. its removal from Moraitis' premises at the cost of the Supplier.

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

- a. the Supplier does not respond within TWENTY FOUR (24) hours of notification by Moraitis in accordance with clause 33;
- b. 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 Moraitis' premises or make other arrangements with Moraitis for sale or resale of the Produce, within a further TWO (2) Business Days of the Supplier's response under clause 33; or

- c. no agreement to re-negotiate the Purchase Price has been reached with Moraitis within THREE (3) Business Days of the Supplier's response under clause 33.

(35) Where clause 34 applies:

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

#### **RETURNS OF PRODUCE**

(36) The Supplier agrees that despite the sale of Produce to a third party where Moraitis 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 Moraitis following the sale to the third party of such Produce, which is accepted by Moraitis, 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 Moraitis 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 Moraitis and the Supplier in the event that Delivery of such Produce occurs after the Return) from the amounts payable by Moraitis to the Supplier, subject to notification by Moraitis 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 Moraitis' 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 Moraitis against all claims or losses that may be brought against or incurred or suffered by Moraitis 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 Moraitis' rights under this clause 39.

#### **DISPUTE RESOLUTION**

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

- a. its internal Dispute Resolution Procedure as available to download at the website of its parent company [www.moraitis.com.au](http://www.moraitis.com.au); and/or
- b. the dispute resolution procedures under the Code; and /or
- c. 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 Moraitis 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 Moraitis 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 Moraitis and the Supplier.

#### **NO WAIVER**

(42) Any time or other indulgence that Moraitis may grant to the Supplier shall not affect the rights of Moraitis except to the extent that Moraitis 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 in which the purchase transaction is completed. Each party submits to the non-exclusive jurisdiction of the Courts of that State and any Court that hears appeals from such Courts.

#### **ENTIRE AGREEMENT**

(45) These Terms and HPA, including the Details and any Order Form or Purchase Order, represent the entire agreement and understanding between Moraitis 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 Moraitis and the Supplier, or by Moraitis making publicly available a document that sets out the variations to its terms of trade and incorporates the variations into these Terms and HPA. Moraitis will make all reasonable efforts to notify the Supplier of any such variation. If the Supplier continues to provide Produce after Moraitis makes such document publicly available, or accepts any Order Form or Purchase Order issued by Moraitis 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 Moraitis 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 Moraitis 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 Moraitis or the Supplier.

(50) The Supplier or Moraitis 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 Moraitis under

these Terms and HPA after the Termination Notice but shall not apply to any Produce purchased by Moraitis before the Termination Notice; and

- c. will not affect any accrued rights or obligations of Moraitis 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>Moraitis:</i>	Name: Moraitis Pty Limited Moraitis Fresh Pty Limited Address:	ABN: 33 119 180 004 ABN: 98 071 791 369 Phone: Fax:			
	<b>Contact Name:</b>				
<i>Moraitis 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>					
<b><i>Business Days until Payment after Delivery:</i></b>					

**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 Moraitis 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 <b>Supplier</b> by its authorised representative in the presence of the witness:  _____ Signature of Supplier  _____ Print Name of Signatory  Date of signing:
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