



## Horticulture Produce Agreement – Merchant

### Commercial Terms Schedule

Grower's Details		Merchant's details
Name		Arcella Banana Company
Address and ABN		Stands 31-36 E Building Sydney Markets NSW 2129. ABN 23 001 982 743
Representative		Patrick Arcella
Email, phone and fax		(02) 9746 7857

<b>Start Date</b>	The date on which the Agreement is signed by both parties.
<b>Term</b>	The Agreement will commence on the Start Date and remain in force unless the Agreement is terminated in accordance with clause 15.
<b>Place of Delivery</b>	Arcella Bananas, stands 31-36 E Building Sydney Markets or any other location as directed by the Merchant.
<b>Reporting Period</b>	One week
<b>Statement Period</b>	14 days
<b>Produce</b>	Bananas or any other line of produce including but not limited to avocados, mangoes, papaya, mushrooms and limes.
<b>Quantity</b>	The Grower must deliver the quantity of Produce as directed by the Merchant. Volume over the directed amount will be considered Oversupply.
<b>Specification</b>	To be acceptable must achieve a quality rating of 90% as required by supermarket chains. Produce not achieving 90% will be sold at market value and may incur additional Services fee for grading of inferior quality. If Supermarket specification does not apply to be acceptable Produce must meet Freshspecs specifications. Produce not achieving these specifications will be sold at market value and may incur additional Services fee for grading of inferior quality.
<b>Price</b>	The Price payable for the Produce will be the average sales price for each class of Produce (this may be a pooled average sales price – see clause 10) delivered in the Reporting Period less Marketing Commission and any applicable Services.



<b>Marketing Commission</b>	15% with possible variation to a minimum of 10% and maximum of 20% at Merchants discretion.
<b>Services (when applicable)</b>	Ripening - \$2 per Unit Grading of inferior quality - \$ 2 per Unit Grading of Underweight fruit - \$2 per Unit Storage of Oversupply - \$2 per Unit Dumping – see clause 12 below.
<b>Time for Payment for Produce</b>	28 to 35 days
<b>Grower's Bank Account</b>	<b>BANK</b> _____  <b>BSB</b> _____  <b>ACCOUNT #</b> _____
<b>State or Territory for jurisdiction and business Days</b>	New South Wales

**The parties agree to the terms of this Agreement.**

**Signed by the Grower**

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Signature: \_\_\_\_\_

**Signed by the Merchant**

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Signature: \_\_\_\_\_



## Terms and Conditions

### 1. Agreement

- 1.1. The Grower agrees to deliver, and the Merchant agrees to buy Produce of the type, Quantity, Quality and Specifications stated in this Agreement or as ordered by the Merchant for the Price in accordance with this Agreement.
- 1.2. This Agreement will commence on the Start Date and will continue for the Term.
- 1.3. The parties agree that the Special Conditions form part of this Agreement.

### 2. Merchant's reporting obligations

- 2.1. For each Reporting Period, the Merchant will give the Grower a Statement for the Reporting Period, specifying for the Produce received by the Merchant during the Reporting Period:
  - (a) the quality and quantity of the Produce bought by the Merchant;
  - (b) the average sale price for the Produce (this may be the pooled average sales price);
  - (c) the price paid for the Produce;
  - (d) the date on which the Produce was delivered to the Merchant.
- 2.2. The Merchant will give the Statement referred to in clause 2.1 to the Grower within the Statement Period.

### 3. Merchant's other obligations

- 3.1. During the period the Grower's Produce is under the Merchant's control, the Merchant will exercise all reasonable care and skill in handling and storing the Produce to ensure that the Produce remains of the highest quality possible.
- 3.2. The care and skill the Merchant must exercise under clause 3.1 must be exercised until the ownership of the Produce passes to the purchaser of the Produce.

### 4. Payment

- 4.1. The Merchant will pay the Price less Marketing Commission and any applicable Services to the Grower for the purchase of the Grower's delivered Produce.
- 4.2. Payment must be made within the Time for Payment for Produce to the Grower's Bank Account.

### 5. Delivery of Produce

- 5.1. For the purposes of this Agreement, delivery of Produce occurs when the Produce is ready for sale to the customer. (ie. After ripening).
- 5.2. The Grower will bear the costs of delivery of the Produce to the Merchant, unless agreed otherwise by the parties in writing.





- 5.3. The Grower will include with each delivery, documentation listing the quantity and type of all Produce in the delivery.

## 6. Type of Produce

The Grower will deliver the types of Produce to the Merchant in accordance with the terms of this Agreement or as otherwise directed by the Merchant.

## 7. Specification of Produce

Produce delivered by the Grower must meet the specification requirements provided in this Agreement.

## 8. Quantity requirements

Produce delivered by the Grower must meet the Quantity in accordance with the terms of this Agreement or as ordered by the Merchant.

## 9. Rejection of Produce

- 9.1. The Merchant will accept and be deemed to have accepted delivery of all Produce delivered to the Merchant unless the Merchant rejects the Produce as set out in this clause.
- 9.2. The Merchant may reject such part of the Produce delivered by the Grower that does not materially satisfy the type or Quality or Quantity requirements specified in this Agreement.
- 9.3. The Merchant may also reject the Produce if:
- (a) the Grower does not have title in the Produce delivered by the Grower; or
  - (a) if the Produce is not delivered in accordance with this Agreement.
- 9.4. A rejection by the Merchant is not effective (and the Merchant is deemed to have accepted the Produce) unless within 24 hours after the time at which the Produce is delivered, the Merchant notifies the Grower in writing that the Produce is rejected and provides valid reasons for the rejection.

## 10. Pooling of Produce

- 10.1. The Merchant may pool Produce delivered by the Grower under this Agreement with produce from another grower/s if all the produce is of similar class and quality.
- 10.2. Where the Merchant pools Produce in accordance with this Agreement, the Merchant will determine the overall average sales price for the pooled produce, which the Grower will be paid from this price.

## 11. Title

- 11.1. The Grower warrants that it has title in the Produce that it delivers to the Merchant.
- 11.2. Title in the Produce supplied by the Grower in accordance with this Agreement will pass to the Merchant when the Produce is ready for sale (ie. After ripening) or at the time any required Services are completed, whichever is the latter.



## 12. Unsaleable Fruit

If Fruit arrives in an unsaleable condition caused by farming issues or transport problems (for example- frozen, overheated and mixed ripe) the Grower will be liable for the cost of dumping and dispersal of the Produce. The Merchant will notify the grower of any cost involved and deduct this cost as a Service fee from the next payment.

## 13. Insurance

13.1. The Merchant has insurance for the Produce under the Merchant's control.

## 14 Dispute resolution

14.1 In the event that there is a dispute between the parties under this Agreement or the Code, each party should contact the other party's representative named in the Commercial Terms schedule.

14.2 The parties agree that if a dispute arises between them in relation to any matter covered by this Agreement or the Code, they will follow the dispute resolution procedure set out in Part 5 of the Code.

## 15 Termination

15.1 This Agreement can be terminated by either party giving four weeks' written notice of termination to the other party.

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

- (a) is in material breach of this Agreement such that the breach cannot be remedied;
- (a) is in breach of this Agreement and fails to remedy the breach within 14 days of receiving written notice of the breach; or
- (b) if an Insolvency Event happens to the other party.

15.3 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
- (b) the rights and obligations of the parties which survive termination or expiry of this Agreement.

15.4 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.

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

15.6 Subject to clause 15.7, a party to this Agreement who receives a payment (of money or other valuable consideration) for the purposes of, and directly related to, trade that would have



occurred after the termination of the Agreement, must return the payment to the party who made the payment within 14 days after the day on which the Agreement is terminated.

- 15.7 A party required to return a payment under clause 15.6 may deduct, from the amount to be returned, reasonable expenses incurred under this Agreement for the purposes of, and directly related to, trade that would have occurred after the termination of this Agreement.

## 16 Goods and Services Tax

### 16.1 Interpretation

A word or expression defined in the GST Act has the meaning given to it in that Act.

### 16.2 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.

### 16.3 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 16.2.

### 16.4 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.

## 17 Miscellaneous

### 17.1 Interpretation

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

### 17.2 Legal Advice

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

### 17.3 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 Merchant's details (as applicable) in the Commercial Terms Schedule.
- (b) Notice given in accordance with clause 17.3(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 facsimile, when the sender's facsimile system generates a message confirming successful transmission of the notice in entirety; and
  - iv. if sent by email, when the sender's email system confirms successful delivery of the notice to the recipient's server.
- (c) but if the delivery, receipt or transmission is not on a Business Day or is after 5.00 pm on a Business Day, the notice is taken to be received at 9.00 am on the Business Day after that delivery, receipt or transmission.

#### 17.4 Without Breach

This Agreement will terminate upon mutual written agreement of the parties.

#### 17.5 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 all other parties.

#### 17.6 Costs

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

#### 17.7 Counterparts

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

#### 17.8 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 it may have under general law or otherwise.

#### 17.9 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 the provisions of this Agreement.

#### 17.10 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.

#### 17.11 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.

#### 17.12 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.

#### 17.13 Relationship

Unless expressly stated otherwise, this Agreement does not create a relationship of employment, trust, agency or partnership between the parties.

#### 17.14 Obligation to Act in Good Faith

Both parties must at all times deal with the other party to this Agreement in good faith.

#### 17.15 Time is of the Essence

Time is of the essence of this Agreement in respect of a time for performance of any obligation in this Agreement. If the parties agree to vary any time requirement of this Agreement, any varied time requirement will be of the essence of this Agreement.

#### 17.16 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.

#### 17.17 Governing Law and Jurisdiction

This Agreement is governed by the laws of the state or territory nominated in the Commercial terms schedule.

### 18 Definitions

#### **In this Agreement–**

**Agreement** means this agreement comprising the Commercial Terms Schedule and the Terms and Conditions.

**Business Day** means a day on which banks are open for general banking business in the state or territory nominated in the commercial terms schedule other than a Saturday, Sunday or public holiday.

**Code** means the Horticulture Code of Conduct prescribed by the *Competition and Consumer (Industry Codes–Horticulture) Regulations 2017*, as amended from time to time.

**Grower** means the person or entity specified in the Commercial Terms Schedule.

**FreshSpecs Produce Specifications** means produce specifications published by Fresh Markets Australia





**Insolvency Event** is when a party becomes insolvent within the meaning of section 95A of the Corporations Act 2001 (Cth);

**Produce** means the produce described in the Commercial Terms Schedule.

**Merchant** means a person or entity specified in the Commercial Terms Schedule.

**Statement** means a statement provided to the Grower by the Merchant specifying the Produce sales details for the Reporting Period in accordance with clause 2.1.

**Oversupply** occurs when the Grower sends Produce other than the type or Quantity directed by the Merchant.

**Unit** - refers to one carton, box, tray or any other means of packaging as part of an overall consignment of Produce sent by the Grower.