

ANNEXURE 1 – MERCHANT TERMS OF TRADE

This document sets out the Terms of Trade for the purposes of the Horticulture Code of Conduct contained in the *Competition and Consumer (Industry Codes—Horticulture) Regulations 2017* (Cth) (**Code**) for WF Montague Pty Ltd ACN (ACN 004 410 664) (**Montague**). These Merchant Terms of Trade (**Terms**) are the general and standard terms upon which Montague will trade with 'growers' as a 'merchant' in respect of 'horticultural produce' (as those terms are defined in the Code).

When signed by both parties, or accepted by both parties by a written notice of offer and a written notice of acceptance, these Terms will constitute and form part of a Horticulture Produce Agreement between Montague and the Supplier set out in the Horticulture Produce Agreement, and for the purposes of the Code, with effect from the Commencement Date.

Nothing in these Terms obliges Montague to accept any particular volume or quantity of Produce from the Supplier pursuant to these Terms. Montague retains an absolute discretion whether or not to accept Produce pursuant to these Terms. Where Montague does accept Produce, then these Terms apply.

DEFINITIONS

In these Terms:-

"Business Day" means a day that is not a Saturday, Sunday or a designated public holiday in Victoria.

"Commencement Date" means the date set out in Section A of the Horticulture Produce Agreement .

"Delivery" occurs when Produce is voluntarily received by Montague from the Supplier for the purposes of immediately making the Produce available for re-sale by Montague, and:

- a) Delivery will not occur when:
 - i) all or part of the Produce received is Non-Complying Produce or Oversupplied Produce;
 - ii) the Produce is received at Montague's premises without Montague voluntarily taking possession of the Produce;
 - iii) the Produce is received by Montague (or a third party) as bailee under storage and warehousing arrangements; or
 - iv) the Supplier has not complied with the delivery requirements specified in Annexure 3 of the Horticulture Produce Agreement.

(each of which is a **Non-Delivery Event**); and

- b) Where a Non-Delivery Event has occurred, Delivery will be deemed to subsequently occur upon Montague:
 - i) voluntarily receiving or obtaining possession of the Produce; or
 - ii) voluntarily changing the nature of the possession of the Produce such that it is held for the purpose of immediately making the Produce available for re-sale by Montague.

"Delivered", "Deliver" and other forms of the word "Deliver" when capitalised shall have a corresponding meaning.

"Horticulture Produce Agreement" means the agreement between Montague and the Supplier, including these Terms and any other relevant Sections and Annexures as set out in the Horticulture Produce Agreement.

"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.

"including" or similar expressions are not words of limitation.

"Montague" means the Montague Company set out in Section A of the Horticulture Produce Agreement.

"Non-Complying Produce" means Produce treated as Non-Complying Produce pursuant to clause 23 or 32 of these Terms.

"Nursery Products" 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.

"Oversupplied Produce" means Produce treated as Oversupplied Produce under clause 20.

"Person" shall include an incorporated body or other entity. If a party consists of more than one Person then these Terms bind them jointly and each of them severally and include the party's executors, administrators, successors and permitted assignees.

"Produce" means unprocessed:

- a. fruits;
- b. vegetables, including mushrooms and other edible fungi;
- c. nuts;
- d. herbs;
- e. other edible plants;

but does not include Nursery Products.

"Purchase Price" means the amount determined under clause 8.

"Reporting Period" means the reporting period for the Statement specified in Section B of the Horticulture Produce Agreement.

"Supplier" means the Person or entity set out in Section A of the Horticulture Produce Agreement.

"Statement" means the statement to be provided by Montague under clause 13.

"Week" means the period Saturday to Friday inclusive.

TERMS AND CONDITIONS

General

1. These Terms shall apply to all purchases of Produce pursuant to the Horticulture Produce Agreement by Montague and the Supplier on or after the Commencement Date unless:
 - a. by specific written agreement to the contrary; or
 - b. these Terms are replaced by another set of terms at a later date (in which case, transactions occurring after that date will be conducted on those new terms); or
 - c. the transaction is not a transaction that would be covered by the Code.
2. For the purposes of the Code, Montague purchases the Produce from the Supplier as a merchant.

Transfer of Title and Risk

3. The parties acknowledge that despite the Delivery of the Produce under these Terms, title and risk in respect of the Produce shall only pass in accordance with clauses 4 and 6.
4. Despite anything else in these Terms, title to the Produce will only pass to Montague as follows:
 - a. if the Purchase Price of the Produce has been agreed to by Montague and the Supplier before Delivery of the Produce to Montague - title to the Produce will pass on Delivery of the Produce to Montague; or
 - b. if paragraph (a) does not apply and Montague is to perform a service in relation to the Produce- title to the Produce will pass at the time the service is completed; or
 - c. if paragraphs (a) and (b) do not apply - title to the Produce will pass at the time that Montague and the Supplier agree on the Purchase Price for the Produce.

5. The Supplier covenants and warrants that:
 - a. it has all right, title and interest in and to the Produce;
 - b. title will pass to Montague clear of all encumbrances, claims and other adverse interest; and
 - c. the Supplier is the grower of the Produce.
6. Montague will assume risk in respect of the Produce once title to the Produce passes to Montague under clause 4.
7. Montague shall not be obliged to keep insurances in respect of Produce in its legal and physical control (**Insurance**). If Montague does have Insurance, the details are set out in Section B of the Horticulture Produce Agreement. Montague will not be liable for loss or damage to the Produce arising from any cause or event outside of the control of Montague. If the details of Insurance in the Horticulture Produce Agreement are not stated, Montague does not hold Insurance.

Price Determination

8. The Purchase Price for Produce shall be agreed by the parties in writing, once the quantity of the Produce, and its conformity with the Specifications has been determined. The method by which the parties will agree the Purchase Price is set out in Annexure 2 of the Horticulture Produce Agreement.
9. Where a Purchase Price cannot be agreed in writing, Montague may reject the Produce and clauses 28 and 29 shall apply.

Limit on Claims

10. Montague shall not be liable in respect of any claim by the Supplier unless such claim is received in writing within the number of Business Days, as advised in Section B of the Horticulture Produce Agreement, from the issue by Montague of the Statement in respect of the relevant Produce.

Business Payments and Reporting Obligations

11. Montague agrees to make payments to the Supplier in accordance with the following:
 - a. Payment will be made no later than 21 Business Days from the end of the Week during which the relevant Produce is Delivered to the Supplier.
 - b. Such payments shall be by cheque or direct bank deposit to the credit of the Supplier as specified in writing by the Supplier.
12. Montague is authorised to deduct or offset charges from payments to be made to the Supplier for:
 - a. Any payments made on behalf of the Supplier where Montague has agreed to make such payments (eg. transport/unloading/packaging);
 - b. Levies and fees for service payable under State or Commonwealth legislation or any voluntary arrangement;

- c. Goods and Service Tax in respect of any item for which a Tax Invoice has been issued; and
- d. any fees payable for services provided by Montague to the Supplier, as agreed in any applicable Services Agreement, including as incorporated into this Horticulture Produce Agreement at Annexure 4.

Montague will not charge the Supplier a fee, commission or other amount for services performed by Montague under these Terms other than as set out in any applicable Services Agreement, or such other Services Agreement as the parties may agree from time to time.

13. Montague will provide a statement to the Supplier containing the following details, covering the Reporting Period (**Statement**):
- a. Supplier's reference or shipping note number;
 - b. Description of the quality of Produce purchased;
 - c. Details of the quantity of Produce purchased;
 - d. The date or dates of the purchases of Produce;
 - e. The Purchase Price for the Produce;
 - f. The date on which the Produce was Delivered to Montague;
 - g. Details of any Non-Complying Produce that is disposed of, or otherwise dealt with, in accordance with clauses 26, 28, 29, 30, 31 and 32 of these Terms;
 - h. A copy of any relevant Inspection Certificate obtained in accordance with clause 28.e.ii of these Terms.
- Montague will give the Statement to the Supplier within such number of days following the end of the relevant Reporting Period as identified in Section B of the Horticulture Produce Agreement.
14. Montague will issue a Tax Invoice to the Supplier in respect of any item for which Goods and Services Tax is chargeable.
15. Montague may, in its sole and absolute discretion, provide the Supplier with a marketing bonus (in cash or otherwise) at an amount and at such times as determined by Montague in its discretion, having regard to the following factors:
- a. the relationship of the Supplier to Montague, including the Supplier's loyalty in dealings with Montague;
 - b. the level of compliance by the Supplier with these Terms in relation to specific Produce or generally;
 - c. the quality and presentation of Produce delivered to Montague under these Terms including the presentation and packing of such Produce; and
 - d. whether in view of one or more of the factors listed in paragraph a. to c. above, Montague has been able to secure a sale price to a third party over and above its expectations.

16. The Supplier agrees to provide documentation that is suitable to Montague that accurately describes the quantity, variety, size, class, description and characteristics of the Produce, including containers, prior to Delivery of Produce to Montague.
17. The Supplier warrants that:
- a. the Produce dispatched to Montague is fit for human consumption and complies with any statutory regulations including food safety, packaging and/or labeling; and
 - b. it has complied with the National Measurement Act 1960 (Cth) and other applicable laws with respect to the Produce.
18. Montague requires that, and the Supplier warrants that, the Produce delivered to Montague is fit for its purpose, and in every case, is packed or presented and complies with the following product specifications including in relation to quality and shelf life (**Produce Specifications**):
- a. written product and delivery specifications provided by Montague to the Supplier from time to time or where reasonably necessary, reflecting the quality standards imposed on Montague by third parties, prior to the Purchase Price being set with respect to the Produce or as otherwise agreed to in writing between Montague and the Supplier (**Business Requirements**); and
 - b. where:
 - (i) there are no relevant Business Requirements; or
 - (ii) the FreshSpecs Produce Specifications that may be published by the Australian Chamber of Fruit and Vegetable Industries from time to time (**FreshSpecs**) are not inconsistent with the Business Requirements,
 the FreshSpecs.
19. The Supplier must not dispatch Produce to Montague that:
- a. does not comply with the Produce Specifications; or
 - b. has not been solicited by Montague.
20. Despite anything else in these Terms in the event that within TWO (2) Business Days following receipt of the Produce by Montague (whether or not Delivery has occurred), Montague considers, in its sole discretion, that:
- a. market conditions in respect of the relevant Produce or generally, are not conducive to procuring an appropriate sale price for the Produce; or
 - b. there is a relative oversupply of the Produce in the market.
- Montague may elect to treat all or part of the Produce as Oversupplied Produce.

21. The Supplier agrees to implement and maintain an industry recognized 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 Montague upon request.
22. The Supplier agrees to supply details of their registered Australian Business Number (ABN) prior to any payment being made by Montague.

Montague Obligations

23. During the period the Produce is under Montague's control, Montague will exercise all reasonable care and skill in handling and storage to ensure that the Produce remains of the highest quality possible.
24. The care and skill Montague must exercise under clause 23 must be exercised until title to the Produce passes to Montague in accordance with these Terms.

Complying and Non-Complying Produce

25. The Supplier must ensure that Produce supplied to Montague complies with clauses 5, 16, 17 and 18 or that Produce will be treated as Non-Complying Produce.
26. Where these Terms provide that Produce is to be treated as Non-Complying Produce or Oversupplied Produce, then Montague shall be entitled within TWO (2) Business Days of:
 - a. in relation to Produce treated under clause 32 as Non-Complying Produce - Montague deciding to accept the claim for credit, as contemplated in clause 31; or
 - b. in relation to Produce treated under clause 25 as Non-Complying Produce - receipt of the Produce by Montague (whether or not Delivery has occurred),
 to elect (the day the election is made being the **Non-Compliance Day**), to:
 - c. reject all of the Produce;
 - d. accept all of the Produce; or
 - e. accept part of the Produce and reject the balance of the Produce.

For the purposes of clause 22(2)(b) of the Code, the treatment of Produce as Non-Complying Produce or Oversupplied Produce in accordance with these Terms is a circumstance in which Montague may, in accordance with this clause 26, reject all or part of that Produce.

27. Where Montague elects to accept all or part of the Produce under clause 26, or fails to give a notice under clause 28e to reject all or part of the Produce (**Accepted Produce**), then these Terms generally shall apply to require Montague to purchase the Accepted Produce for the Purchase Price relevant to that Accepted Produce.

28. Where Montague elects to reject all or part of the Produce (**Rejected Produce**) under clauses 9 or 26, then subject only to clause 28e:
 - a. Montague shall be deemed not to have purchased the Rejected Produce, and the Supplier shall retain or re-acquire (as the case may be) title and risk in and to the Rejected Produce;
 - b. the Supplier is not entitled to the Purchase Price with respect to the Rejected Produce;
 - c. Montague will be deemed not to have received Delivery of the Rejected Produce; and
 - d. Montague will, within TWENTY FOUR (24) hours after the time at which the Rejected Produce was rejected, advise the Supplier of the rejection.
 - e. Within TWO (2) Business Days of the Non-Compliance Day (being a period specified for the purposes of clause 22(4) of the Code), Montague will advise the Supplier in writing of the rejection and the reasons for such rejection and request that the Supplier advise as to whether the Supplier:
 - i. wishes to retake possession of the Produce; or
 - ii. 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; or
 - iii. wishes to make other arrangements for the storage or warehousing of the Produce, sale or resale of the Produce or its removal from Montague's premises.

29. Despite anything else in these Terms, Montague may elect to destroy and dispose of the Produce, or deliver the Produce to the Supplier if:
 - a. the Supplier does not respond within TWENTY FOUR (24) hours of notification in accordance with clause 28.e.;
 - b. the Supplier fails to retake possession of the Produce within FIVE (5) Business Days of the Supplier indicating an intention to do so under clause 28.e.; or
 - c. no agreement on the Purchase Price has been reached between the Supplier and Montague within ONE (1) Business Day of written notification of the rejection in accordance with clause 28.e.

The Supplier authorizes and confirms by virtue of entry into these terms, such action by Montague.

30. Where clause 29 applies any destruction, disposal and/or delivery of Produce is at the Supplier's expense.

Return of Produce

31. The Supplier agrees that any claims for credit which result following the sale of the Produce by Montague to a third party,

which claims are accepted by Montague (**Return**), due to the Produce not complying with clause 5, 16, 17 or 18, may be deducted (after allowing for the new Purchase Price for some or all of the Produce which may be payable to the Supplier in the event that Delivery of such Produce occurs after the Return) from the amounts payable by Montague to the Supplier under clause 11, subject to notification by Montague within TWO (2) Business Days from receipt of such claim request.

32. Produce returned under clause 31 will be treated as Non-Complying Produce and subjected to clauses 13, 26, 27, 28, 29 and 30 of these Terms.
33. The Supplier acknowledges that any amount deducted under clause 31 represents a genuine pre-estimate of Montague's loss as a result of the Produce not complying with clause 5, 16, 17 or 18 of these Terms.
34. Unless otherwise agreed, the Supplier shall within FORTY EIGHT (48) hours of advising Montague that it wishes to retake possession of the Produce (at its own cost) remove from the place of delivery the Rejected Produce.

Dispute Resolution

35. In the case of a dispute that may arise under these Terms:
 - a. the person that Montague should contact on behalf of the Supplier (Supplier's Contact) is set out in Section B of the Horticulture Produce Agreement;
 - b. the person that the Supplier should contact on behalf of Montague (Montague's Contact) is set out in Section B of the Horticulture Produce Agreement;
 - c. Montague and the Supplier shall use the following to resolve the dispute:
 - i. If required by Montague – Montague's own internal dispute resolution procedure; and/or
 - ii. the dispute resolution procedures under the Code.
 - d. In the case of a dispute relating to quality, the Specifications described at Section B of the Horticulture Produce Agreement will apply as the benchmark standard for all Class 1 Produce.

No Waiver

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

Governing Law

37. These Terms are governed by and are to be construed in accordance with the laws in force in the State of Victoria. Each party submits to the non-exclusive jurisdiction of the courts of Victoria.

Severance

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

Varying these Terms

39. Once signed or accepted by the parties, these Terms can only be varied by agreement in writing between Montague and the Supplier.

Terminating these Terms

40. These Terms may be terminated at any time by Montague or the Supplier by providing notice in writing to the other party (**Termination Notice**).
 41. Any such termination:
 - a. except where clause 43 applies – Shall apply prospectively to prevent any dispatch of Produce by the Supplier under these Terms after the Termination Notice but shall not apply to any Produce dispatched by the Supplier (whether Delivered to Montague or not) before the Termination Notice; and
 - b. where clause 43 applies – Shall apply prospectively to prevent any purchase of Produce by Montague under these Terms after the Termination Notice but shall not apply to any Produce purchased by Montague before the Termination Notice; and
 - c. will not affect any accrued rights or obligations of Montague or the Supplier prior to the Termination Notice.
42. Termination of these Terms does not affect the Supplier's or Montague's rights to pursue any other claim, right or entitlement they may have against the other which has accrued or arisen up to and including the date of termination.
43. Despite anything else in these Terms, these Terms may be terminated by either Montague or the Supplier within the cooling-off period under the Code, and in such event:
 - a. clause 41 and clause 42 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 Montague that would have occurred after the Termination Notice (**Trade**), must be returned to the party who made the payment within 14 days after the Termination Notice (less reasonable expenses incurred under these Terms for the purposes of, and directly related to, the Trade).

Pooling Produce

44. Montague may pool Produce Delivered by the Supplier under this agreement with other produce if:
 - a. the other produce is of the same quality as the Produce delivered by the Supplier, and
 - b. the Supplier's Produce and the other produce meet the Produce Requirements specified in these Terms.
45. Where Montague pools Produce in accordance with clause 44, the amount payable to the Supplier will be a proportion of the total proceeds received by Montague for the pooled Produce that is equal to the proportion of the pooled Produce that was contributed by the Supplier.

Services

46. Any services to be performed by Montague for the Supplier shall be specified in and governed by the attached Service Agreement Annexure, which, if applicable, forms part of these Terms of Trade and Horticulture Produce Agreement.