

Horticulture Produce Agreement – Agency Agreement
Commercial Terms Schedule

	Grower's Details	Agent's details
Name		
Address and ABN		
Representative		
Email, phone and fax		

Terms	Complete details
Start Date	
Term	[The parties should agree on the length of the term of the Agreement.]
Place of Delivery	or any other location agreed between the parties in writing.
Reporting Period	Weekly Fortnightly Monthly Other (specify)
Statement Period	
Produce	
Quantity	
Specifications	
Commission	Fixed Percentage Other (specify)
Additional Fees	

Time for Payment	
Grower's Bank Account	
Agent's Insurance Details	
Special Conditions	

The parties agree to the terms of this Agreement.

Signed by the Grower

Name:

Title:

Signature:

Signed by the Agent

Name:

Title:

Signature:

[Clause 15 of the Code provides that this Agreement must be in writing and accepted by the parties. This Agreement may be accepted by signatures of both parties or a written notice of offer and a written notice of acceptance. Ideally, the parties should sign this Agreement. Clause 15 does however allow the parties to accept this Agreement in other written forms such as through email.]

Terms and Conditions

1. Agreement

- 1.1. The Grower agrees to deliver, and the Agent agrees to arrange, on behalf of the Grower, the sale of Produce of the type, Quantity, Quality and Specifications stated in this Agreement and the Commercial Terms Schedule.
- 1.2. This Agreement will commence on the Start Date and will continue for the Term and any extensions of the Term as agreed in writing between the parties.
- 1.3. The parties agree that the Special Conditions form part of this Agreement.

2. Agent's reporting obligations

- 2.1. For each Reporting Period, the Agent will give the Grower a Statement for the Reporting Period, specifying for the Produce received by the Agent during the Reporting Period:
 - (a) the date on which the Produce was delivered to the Agent;
 - (b) the date or dates of the sale of the Produce by the Agent;
 - (c) the type and quantity of the Produce sold;
 - (d) the price received for the Produce sold;
 - (e) details of each amount deducted by the Agent from the sale price of the Produce; and
 - (f) details of any amounts of the Produce not sold by the Agent during that period, including:
 - I. the reasons why the Produce was not sold;
 - II. details of any amounts of the Produce destroyed by the Agent, and the costs incurred in destroying the Produce; [Consider who is responsible for the costs

incurred for the destruction of the Produce.]

- III. details of any amounts of the Produce held by the Agent at the end of the period; and
- IV. what happened to unsold Produce.

- 2.2. The Agent will give the Statement referred to in subclause 2.1 to the Grower within the Statement Period.

3. Agent's other obligations

- 3.1. During the period the Grower's Produce is under the Agent's control, the Agent will exercise all reasonable care and skill in handling and storage to ensure that the Produce remains of the highest quality possible.
- 3.2. The care and skill the Agent must exercise under subclause 3.1 must be exercised until the ownership of the Produce passes to a Merchant.
- 3.3. The Agent:
 - (a) will act in the best interests of the Grower when selling Produce under this Agreement, and
 - (b) will not sell the Grower's Produce, other than on an arm's length basis, unless the Agent has first obtained the Grower's consent, in writing, to do so.

4. Commission and fees

- 4.1. Subject to subclause 11.2 the Grower will pay the Agent the Commission. The Agent is not entitled to any other payment unless provided for in the Additional Fees payable by the Grower to the Agent in the Commercial Terms Schedule or as otherwise agreed in writing.
- 4.2. The Commission is only payable if the Produce is sold by the Agent and payment is received from the Merchant.

4.3. The Agent must invoice Merchants on the Grower's behalf, collect the sales revenue on the Grower's behalf and collect any monies owed by Merchants to the Grower on the Grower's behalf at no cost to the Grower. [Please consider whether this is applicable to specific Grower/Agent commercial arrangements and whether any fees should be charged by the Agent.]

5. Price

5.1. Subject to clauses 5.2 and 5.3, the Agent will sell the Produce on behalf of the Grower [on the best commercial terms possible].

5.2. Before delivering Produce to the Agent, the Grower may notify the Agent in writing of a minimum price for which the Produce is to be sold [insert any conditions that the Grower has regarding price such as minimum prices, a method for calculating a suitable price, approval by the Grower etc.]. The Agent may notify the Grower that it is not willing to accept a delivery of the Produce on such terms and the Grower must not then attempt to deliver the Produce to the Agent.

5.3. The Agent must respond to the Grower's notification in writing within [24 hours] of receipt, notifying the Grower that it [will / will not] accept delivery of the Produce on those terms.

6. Payment

6.1. The Agent will pay to the Grower the proceeds of a sale of the Grower's delivered Produce, less the agreed Commission and any Additional Fees payable pursuant to this Agreement.

6.2. Payment must be made at or before the Time for Payment to the Grower's Bank Account.

7. Delivery of Produce

7.1. For the purposes of this Agreement, delivery of Produce occurs when the Produce arrives at the Place of Delivery. [Delivery is not defined

under the Code. It is important that this Agreement reflects the commercial arrangement between the parties. Please carefully consider this clause and amend as appropriate.]

7.2. The Grower will bear the costs of delivery of the Produce to the Agent, unless agreed otherwise by the parties in writing.

7.3. The Grower will include, with each delivery, documentation listing the Quantity and type of all Produce in the delivery.

7.4. The Agent will provide secure and suitable off-loading facilities at the Place of Delivery so as to facilitate the safe and timely off-loading of the Produce. The [Agent / Grower] will be responsible for the off-loading of the Produce. [Consider who will off-load the Produce at the Place of Delivery. If there is no industry standard then insert the party that will off-load the Produce.]

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

8. Type of Produce

The Grower will deliver the types of Produce to the Agent in accordance with the terms of this Agreement or as otherwise agreed between the parties in writing.

9. Quality of Produce

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

10. Quantity requirements

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

11. Rejection of Produce

11.1. The Agent will accept and be deemed to have accepted delivery of all Produce delivered to the Agent unless the Agent rejects the Produce

as set out in this clause 11. [The circumstances in which the Agent may reject the Produce delivered by the Grower must be specified in this Agreement. If the circumstances are not specified in this Agreement then the circumstances may not be relied upon.]

11.2. The Agent may reject such part of the Produce delivered by the Grower that does not materially satisfy the type, Quality or Quantity requirements specified in this Agreement.

11.3. The Agent may also reject the Produce if:

- (a) the Grower does not have title in the Produce delivered by the Grower; or
- (b) if the Produce is not delivered in accordance with this Agreement.

11.4. A rejection by the Agent is not effective (and the Agent is deemed to have accepted the Produce) unless within 24 hours [Consider appropriate timing to reject the Produce and amend accordingly.] after the time at which the Produce is delivered, the Agent notifies the Grower in writing that the Produce is rejected and provides valid reasons for the rejection.

11.5. Where Produce is rejected by the Agent, the Agent will hold the Produce at [insert address / the Place of Delivery] for collection by the Grower at an agreed time [or return the Produce to the Grower at the Grower's expense] unless the grower agrees in writing to renegotiate the sale of the rejected produce to the Agent including but not limited to negotiating a class for the produce other than class 1 produce as defined by FreshSpecs produce specification

12. Pooling of produce

12.1. [If the Agent is not permitted to pool Produce then include this clause, otherwise delete this clause] The Agent may not pool Produce delivered by the Grower under this Agreement with other produce.

12.2. [If the Agent is permitted to pool Produce then include this clause, otherwise delete this clause and clause 12.3.] The Agent may pool Produce delivered by the Grower under this Agreement with other produce if:

- (a) the other produce is of the same quality as the Produce delivered by the Grower; and
- (b) the Produce and other produce meet the Quality requirements specified in this Agreement.

[If the parties agree that the Agent may pool Produce then this must be provided for in this Agreement in accordance with clause 23 of the Code. Pooled produce must all be of the same quality and the quality requirements must be recorded in this Agreement.]

12.3. Where the Agent pools Produce in accordance with this Agreement, the amount payable to the Grower will be a proportion of the total proceeds received by the Agent for pooled produce that is equal to the proportion of the pooled produce that was contributed by the Grower, less any Commission or Additional Fees payable.

13. Title

13.1. The Grower warrants that it has title in the Produce that it delivers to the Agent.

13.2. Title in the Produce remains with the Grower until the Agent sells the Produce.

14. Insurance

14.1. [If the Agent has insurance then include this clause, otherwise delete this clause.] The Agent has insurance for the Produce under the Agent's control. [The Grower should push for the Agent to take out insurance over the Produce covered by this Agreement. If the Agent does not have insurance over the Produce covered by this Agreement then the Grower should take out insurance until ownership has passed to the

Merchant of the Produce. If the Agent does have insurance over the Produce covered by this Agreement then the Grower should take out insurance for any matters not covered by the Agent's Insurance Policy and for any amounts in excess of the Agent's Insurance Policy (as applicable).]

14.2. The details of the insurance policy (**Insurance Policy**) are as follows:

- (a) the Insurance Policy is with [insert name of insurer];
- (b) the maximum amount of insurance cover provided by the Insurance Policy in respect of claims that may be made in relation to the Produce is [insert maximum insurance amount];
- (c) the Insurance Policy covers [delete whichever does not apply] for loss by fire, theft and accidental damage (other than deterioration of quality or any other inherent losses).

15. Bad debts

15.1. The Agent [will / will not – delete whichever does not apply] pursue payment for Bad Debts of the Grower arising under this Agreement. [The Code provides that the Agent may pursue the Bad Debts of the Grower. Pursuant to clause 17(d) and (e) of the Code, the Agreement must specify whether the Agent will pursue the Grower's Bad Debts. In some circumstances it would be appropriate for the Agent to pursue payment of Bad Debts as the Agent and the Merchant will have a pre-existing commercial relationship.]

15.2. [If the Agent will not pursue Bad Debts then include this clause, otherwise delete this clause.] The Agent must, if requested by the Grower, provide the Grower with all information reasonably required by the Grower to enable the Grower to pursue the Bad Debt as may be determined by the Grower.

15.3. [If the Agent will pursue Bad Debts then include this clause, otherwise

delete this clause.] The Agent will pursue payment for Bad Debts of the Grower arising under this Agreement on the following basis:

- (a) the Agent will pursue the Bad Debt for [insert period] or as agreed in writing between the parties;
- (b) the Agent will pursue payment of the Bad Debt provided that the Bad Debt is greater than \$[insert]; and
- (c) when the Agent pursues a Bad Debt the Grower will have [insert role of Grower or if the Grower will have no role, delete this subclause].

16. Limitation of Liability

16.1. Subject to State and Federal laws, notwithstanding any other clause of this Agreement to the contrary, to the maximum extent permitted by law, the Grower's total aggregate liability to the Agent arising out of or in connection with this Agreement is limited to an amount equal to [the Commission paid by the Grower to the Agent in cleared funds over the immediate prior [insert period] period]. [Grower to consider liability exposure for a breach of this Agreement. The maximum amount of liability must be reasonable and could be tied to a percentage of prior commissions paid for a determinate period of time. It is important to note that this clause 16 is subject to State and Federal laws and may be unenforceable.]

16.2. Notwithstanding any other clause of this Agreement to the contrary, to the maximum extent permitted by law, the Grower shall not be liable for:

- (a) any consequential losses; and/or
- (b) any losses, expenses or damages arising from a breach of this Agreement by the Grower to the extent that those losses, expenses or damages were a direct or indirect result of the actions or inaction by the Agent.

[The Agent may request that reciprocal provisions to clauses 16.1 and 16.2 be included in this Agreement.]

17. Dispute resolution

- 17.1. 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.
- 17.2. 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. [Pursuant to clause 38(1) of the Code parties may agree on a different procedure to the procedure set out in Part 5 of the Code.]

18. Termination

[Clause 16(q) of the Code provides that the Agreement must include the process for terminating the Agreement but does not provide any further guidance. The parties may determine how the Agreement is terminated.]

- 18.1. This Agreement can be terminated by either party giving [four (4)] weeks' written notice of termination to the other party. [The parties may wish to adopt this process for termination so that either party can terminate this Agreement at their election. However the parties should consider the appropriate period of notice to ensure that the notice is fair and equitable in the circumstances.]
- 18.2. 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;
 - (b) is in breach of this Agreement and fails to remedy the breach within fourteen (14) days of receiving written notice of the breach; or
 - (c) if an Insolvency Event happens to the other party.
- 18.3. Despite anything else in this Agreement, where the term of this Agreement is 90 days or more, or is not specified, either party may

terminate this Agreement at any time within the cooling-off period being [7 / 14 days – select one] after the day on which this Agreement was entered into. [Pursuant to clause 20 of the Code, parties have a cooling-off period. There is no requirement in the Code that the cooling-off period be included in the Agreement but we recommend a provision be included in this Agreement to ensure that both parties are aware of their right to terminate the Agreement during the cooling-off period.]

- 18.4. 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.
- 18.5. 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.
- 18.6. Where this Agreement is terminated pursuant to this clause 18, any trade that has occurred under this Agreement before the termination is governed by the terms of this Agreement.
- 18.7. Subject to clause 18.8, 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.
- 18.8. A party required to return a payment under clause 18.7 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.

19. Goods and Services Tax

[Please obtain tax advice to confirm if GST is chargeable.]

19.1. Interpretation

In this clause 19, a word or expression defined in the GST Act has the meaning given to it in that Act.

19.2. 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.

19.3. 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 19.2.

19.4. 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.

20. Variation and Changes in Arrangements

The Agreement including the Commercial Terms Schedule may only be varied by written agreement between the parties.

21. Miscellaneous

21.1. Interpretation

In this Agreement, the Terms in the Commercial Terms Schedule have the

meaning as set out in the Commercial Terms Schedule.

21.2. 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.

21.3. 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 Agent's details (as applicable) in the Commercial Terms Schedule.
- (b) Notice given in accordance with 21.3(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.

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.

21.4. Without Breach

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

21.5. 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.

21.6. Costs

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

21.7. Counterparts

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

21.8. 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.

21.9. 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 this Agreement.

21.10. 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.

21.11. 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.

21.12. 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.

21.13. Relationship

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

21.14. Obligation to Act in Good Faith

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

21.15. 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.

21.16. 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.

21.17. Governing Law and Jurisdiction

This Agreement is governed by the laws of [Insert] and each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of [Insert]. [Insert the State in which the Grower operates its business.]

22. Definitions

22.1. Definitions

In this Agreement–

Agent means a person who sells Produce on behalf of a Grower to a Merchant for a commission or fee and for the purposes of this Agreement is the person specified in the Commercial Terms Schedule.

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

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

- (a) an Agent arranges for the person to buy the Produce of the Grower, and
- (b) the Merchant does not pay the Agent for some or all of the Produce by the time that payment is required for the Produce.

Business Day means a day on which banks are open for general banking business in [Insert State] 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.

Insolvency Event includes:

- (a) the party becoming insolvent within the meaning of section 95A of the Corporations Act 2001 (Cth);
- (b) the party ceasing to carry on its business, ceasing to be able to pay its debts as they become due or suspending payment generally, or threatening to cease to carry on its business or to pay its debts;
- (c) a meeting being convened, resolution proposed, petition presented or order made for the winding up of the party;
- (d) any step being taken to appoint a receiver, receiver and manager, provisional liquidator, liquidator, administrator or other like person in relation to all or any material asset of the party;

(e) the party disposing of the whole or a substantial part of its assets, operations or business, other than in the ordinary course of business;

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

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

Produce means the produce described in the Commercial Terms Schedule.

Merchant means a person or entity who purchases the Produce from the Grower.

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

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The commercial terms and arrangements set out in the template documents reflect common industry practice. Users may need to tailor the documents to meet their own commercial circumstances and we recommend obtaining independent legal advice. Users must take care to ensure any change does not result in the document ceasing to meet legislative requirements. Growcom accepts no responsibility for the consequences of any changes which have not been approved in writing by Growcom.