



## MERCHANT TRADING TERMS

**These Merchant Trading Terms are the preferred terms of trade of FreshExchange Pty Ltd trading as Costa Farms when acting as merchant in the trade of horticulture produce.**

**When accepted in writing, these Merchant Trading Terms constitute a horticulture produce agreement for the purposes of the Horticulture Code between the Costa Company set out in item 1 of the Schedule and the Grower set out in Item 2 of the Schedule, appointing that Costa Company to act as merchant for the purchase of the Produce set out in item 3 of the Schedule from the Grower, with effect from the Commencement Date set out in item 4 of the Schedule.**

1. In this document, "**Terms**" means these Merchant Trading Terms, unless the Schedule has been accepted in which case "Terms" will mean the Horticulture Produce Agreement that consists of these Merchant Trading Terms and the Schedule.
2. Nothing in these Terms obliges the Costa Company to accept any unsolicited Produce from the Grower.
3. The Grower warrants (at the time of accepting these Terms and each time that it provides Produce to the Costa Company) that it is the owner of the Produce and that the Produce is of merchantable quality, fit for its purpose and strictly meets the specifications for that Produce set out in item 5 of the Schedule ("**Specifications**").
4. Unless otherwise agreed between the parties in writing, the Produce will be delivered to the Costa Company (at the address specified by the Costa Company from time to time) at the Grower's risk, cost and expense. "Delivery" for the purpose of these Terms occurs when:
  - a. the Produce has been transported to and unloaded at the address of the Costa Company in its capacity as merchant under these Terms; and
  - b. the Costa Company (or its nominated representative) has had a reasonable opportunity to inspect the Produce in accordance with clause 9 and has not rejected the Produce.
5. Title to the Produce will pass to the Costa Company when the Produce is Delivered.
6. For the purposes of clause 4, if Produce that requires ripening prior to sale is supplied to the Costa Company, then:
  - a. the Costa Company is authorised to ripen such Produce in its capacity as service provider to the Grower (rather than in its capacity as merchant under these Terms), until the Costa Company determines that the Produce is sufficiently ripe for sale;
  - b. the Grower acknowledges that the Costa Company is unable to properly inspect the quality of the Produce until it is sufficiently ripe for sale; and
  - c. the Produce will be taken to be delivered to the Costa Company for sale (in its capacity as merchant under these Terms) when the Costa Company determines that the Produce is sufficiently ripe for sale.
7. The price for each consignment (or part consignment, where applicable) of Produce ("**Price**") will be determined in accordance with Item 6 of the Schedule.
8. The Costa Company will pay the Price for Produce to the Grower in accordance with the payment terms set out in item 7 of the Schedule. Unless otherwise expressly agreed, payment will be made by electronic funds transfer to an account nominated by the Grower. The Grower authorises the Costa Company to set off and deduct any moneys owing by the Grower to the Costa Company under any other agreement between the parties prior to paying the Price under this clause. The Costa Company may, if requested or separately authorised by the Grower, also deduct freight costs, royalties and/or levies that would otherwise be payable by the Grower.
9. The Grower, at its own expense, will punctually make the Produce available for inspection by the Costa Company or its nominated representative at the time and location as instructed by the Costa Company from time to time. The Produce must be made available by the Grower to the Costa Company strictly in accordance with the Costa Company's instructions, which may be varied from time to time at the absolute discretion of the Costa Company. The Produce is made available at the sole cost of and risk of the Grower.
10. In addition to the Costa Company's rights under clause 2, the Costa Company or its nominated representative will inspect the Produce and may reject all or some of the Produce for the following reasons:
  - a. where all or some of the Produce does not meet the Specifications;
  - b. where the Costa Company determines that all or some of the Produce is unfit for sale by the Costa Company; or
  - c. where all or some of the Produce is not made available for inspection strictly as directed by the Costa Company.
11. If the Costa Company rejects all or some of the Produce it will:
  - a. immediately contact the Grower to advise what amount of the Produce is rejected;
  - b. confirm that rejection, and the reasons for rejection, in writing within 5 business days; and
  - c. at the risk and cost of the Grower, return the rejected Produce to the Grower (or make it available for collection by the Grower's nominated representative), or destroy the Produce if requested by the Grower.
12. The Grower acknowledges and agrees that the Produce may contain latent quality defects which do not manifest until after the Produce has been made available to the Costa Company. The Costa Company reserves its right to exercise its

rights and remedies under this clause with respect to Produce that manifests such latent quality defects after the Produce has been inspected and accepted by the Costa Company in accordance with clause 11. A written statement by the Costa Company asserting a latent quality defect in Produce, together with reasonable evidence of the defect, the cost and damages to the Costa Company of the defect and when the defect became apparent to the Costa Company will be prima facie evidence of such matters. The cost and damages suffered by the Costa Company as a result of a latent quality defect will be payable by the Grower, or (in the Costa Company's sole discretion) may be set off and deducted from any monies payable by the Costa Company to the Grower.

13. The Costa Company will provide a statement ("**Statement**") to the Grower which, in respect of each successive month will detail the following:
  - a. the quantity and quality of Produce purchased by the Costa Company during the period;
  - b. the date or dates of the purchase of Produce during the period;
  - c. the price paid for the Produce;
  - d. the dates on which Produce was delivered to the Costa Company during the period.The Statement will be delivered by the end of the following month after the reporting period and is prima facie evidence of the accuracy of the matters set out in (a) to (d) above, in the absence of manifest error. Unless otherwise requested by the Grower, the Statement will be taken to have been delivered to the Grower if it is made available for collection at the Costa Company's premises.
14. The Grower indemnifies the Costa Company for all loss, damage, costs or expenses arising from any breach by the Grower of these Terms including without limitation the warranties in clause 3.
15. Where these Terms constitute a Horticulture Produce Agreement, then the Terms may:
  - a. be terminated by either party on no less than 90 days' notice, subject to the Grower's cooling-off rights in the Horticulture Code; and
  - b. only be varied as agreed in writing between the parties.
16. If a dispute arises between the parties, a party may deliver a notice to the contact person specified in items 1 or 2 of the Schedule (as appropriate) setting out the terms of the dispute. Each party must use its reasonable endeavours to resolve the dispute by negotiations with the other. If either party gives notice that it wishes the dispute to be determined in accordance with the procedure in Division 5.2 of the Horticulture Code, the other party must participate in that procedure.
17. The Grower acknowledges that it has received a copy of Costa's 'Supplier Code' ("Supplier Code"). The Grower confirms that it has read and understood the Supplier Code and that it will act in accordance with the Supplier Code (as amended from time to time), including that it will comply with all applicable workplace and employment laws, at all times while supplying Produce to the Costa Company.
18. All dollar amounts expressed in or pursuant to these Terms are exclusive of GST. The Grower is responsible for payment of all GST arising from any supply made by the Costa Company under this agreement.
19. Where the Costa Company is trustee of a trust, it acts as trustee of that trust when entering into any Horticulture Produce Agreement with the Grower.
20. All rights subsisting to the parties at termination shall survive termination.
21. Each Costa Group Company has the benefit of a group stock throughout insurance policy that covers produce under the Costa Group Company's control, subject to the insurance policy terms and conditions, against loss or damage including but not limited to fire, theft or accidental damage (other than deterioration of quality or any other inherent losses). The Insurer Berkshire Hathaway Specialty Insurance and the claim limit is \$5 million.
22. The Costa Company's liability for any loss arising pursuant to these Terms is limited to the amount recovered by the Costa Company from its insurers for such loss.
23. These Terms are governed by the law of the State of Victoria and the parties submit to the non-exclusive jurisdiction of the state of Victoria.
24. These Terms may be executed in counterparts. All counterparts when taken together are taken to constitute the one agreement.
25. By accepting these Merchant Trading Terms, the Grower acknowledges that, before accepting this agreement, Fresh Exchange Pty Ltd asked the Grower to provide:
  - a. a signed statement by the Grower that the Grower has received independent legal advice about the agreement; or
  - b. a signed statement by the Grower that the Grower has been told by Fresh Exchange Pty Ltd that independent legal advice should be sought about the proposed agreement but has decided not to seek that advice.

**SCHEDULE - HORTICULTURE PRODUCE AGREEMENT DETAILS**

**1. Costa Company:**

Company name: FreshExchange Pty Ltd trading as Costa Farms

ABN: 40 008 277 772

Postal Address: Locked Bad 38004, Docklands VIC 8012

Telephone: \_\_\_\_\_

Facsimile: \_\_\_\_\_

Email: \_\_\_\_\_ (and, in the case of a dispute notice or termination notice, should be copied to contractnotices@costagroup.com.au)

Contact person: \_\_\_\_\_

**2. Grower:**

Company name: \_\_\_\_\_

ABN: \_\_\_\_\_

Postal Address: \_\_\_\_\_

Telephone: \_\_\_\_\_

Facsimile: \_\_\_\_\_

Email: \_\_\_\_\_

Contact person: \_\_\_\_\_

**3. Produce:**

**4. Commencement Date:** The date on which these merchant trading terms are signed or otherwise accepted in writing by the Grower.

**5. Produce quality specifications:**

**6. Price:**

The Price is:

(a) an amount to be agreed between the Costa Company and Grower in writing either before, or immediately upon Delivery of the Produce to the Costa Company; or

(b) where no amount is agreed prior to or immediately upon Delivery of the Produce to the Costa Company, the price of the relevant Produce is to be determined in accordance with the following formula:

Price = Sales Price less Margin,

where:

**Price** means the price payable to the Grower

**Sales Price** means the price at which the Costa Company sells the Produce to a third party or parties; and

**Margin** means a dollar amount which is equal to a specified percentage of the Sales Price, with the percentage to be determined by the Costa Company from time to time, but being not more than 20%.

**7. Payment terms:** The Price will be paid within 25 days after the end of the month in which title to the relevant Produce has passed to the Costa Company.

**EXECUTED** for and on behalf of the **COSTA COMPANY:**

**EXECUTED** for and on behalf of the **GROWER:**

\_\_\_\_\_  
Print name

\_\_\_\_\_  
Print name

Date        /        /

Date:        /        /