



# Full Terms and Conditions with Buyers

**Effective 28 May 2012**

Please go to [www.mgmarketing.co.nz](http://www.mgmarketing.co.nz)  
for branch and contact details



## INTRODUCTION

Market Gardeners Limited ("MG") as part of its business:

- (a) sells Produce on behalf of Growers on consignment in an agency capacity to Buyers;
- (b) purchases Produce and on-sells such Produce to Buyers;
- (c) delivers Produce from MG's Premises to the Buyer's premises; and
- (d) procures the delivery of Produce directly from a Grower to a Buyer.

These terms and conditions apply to all sales of Produce by MG whether on consignment or on its own behalf within New Zealand unless MG agrees in writing otherwise.

Any person may apply to purchase Produce by completing the Buyer Application Form. MG may in its sole discretion accept or reject any application to purchase Produce and may refuse to sell Produce to any person.

A person shall be deemed to be bound by these terms and conditions, irrespective of whether that person has signed a Buyer Application Form, where a person: accepts Produce from MG or a Grower; makes or accepts any payment in respect of Produce, freight or Hire Equipment; and/or purchases Produce from MG (either as agent or on its own account).

These terms and conditions are divided into the following sections:

- (a) Section A - relating to the purchase of Produce by Buyers;
- (b) Section B - relating to the terms of delivery if MG is delivering the Produce; and
- (c) Section C - containing general terms applying to all activities in Sections A and B and containing definitions and interpretation provisions.



## SECTION A

### MG TERMS AND CONDITIONS RELATING TO THE PURCHASE OF PRODUCE BY BUYERS

#### 1. MG as Agent for Grower

- 1.1 MG may sell Produce to the Buyer as agent for the relevant Grower or Growers or on its own account.

#### 2. Payment for Supply of Produce

- 2.1 All prices for Produce, fees and other charges (including charges for Hire Equipment) are as specified by MG to the Buyer from time to time, in relation to any particular sale of Produce. All prices are exclusive of GST unless stated otherwise and the Buyer shall pay GST in addition to the agreed price.
- 2.2 Payment shall be made by the Buyer to MG in relation to each acquisition of Produce on the following basis:
  - (a) If the Buyer and MG have not agreed on credit terms for the Buyer and the Buyer has not signed a Buyer Application Form setting out the terms of the credit arrangements, then payment for the Produce shall be made to MG within seven days of the date of purchase.
  - (b) Where the Buyer and MG have agreed on credit terms for the Buyer, and the Buyer has signed a Buyer Application Form setting out the terms of the credit arrangements, and the Buyer is within those credit terms, then the Buyer shall make payment to MG on the basis and on the date and terms set out in the Buyer Application Form.
  - (c) Where MG and the Buyer have an agreement relating to credit terms as set out in (b) above, but the Buyer has exceeded the credit limit or otherwise breached the credit terms, or a transaction would result in the Buyer exceeding the credit limit or breaching the credit terms, then the Buyer shall pay MG within seven days of the date of purchase.



(d) All payments to MG under (a) and (c) above shall be made by way of direct debit (or such other method directed by MG from time to time) and all other payments to MG shall be made by way of direct debit (or such other method directed by MG from time to time) or such other method agreed by MG with the Buyer.

- 2.3 Notwithstanding clause 2.2 MG may at any time when it has concerns as to the solvency of the Buyer or as to the Buyer's account or where the Buyer has on one or more occasions not made payment on the due date, place the Buyer on "cash only" terms whereupon the Buyer shall pay for Produce purchased at the time of purchase by the payment in cash or such other method as may be stipulated by MG.
- 2.4 The Buyer shall not be entitled to set off any amounts owing by MG or the Growers to the Buyer from any monies payable under these terms and conditions and all payments shall be made by the Buyer free from all deductions, rights of set off or any other equitable claim.
- 2.5 MG shall be entitled to apply any monies (including any lump sums) received from the Buyer to: interest charges and existing or overdue accounts in preference to the account in connection with which the monies were supplied by the Buyer; and to the outstanding accounts in order of age of the outstanding accounts with monies being applied to the oldest outstanding account first.
- 2.6 MG shall be entitled to give a Buyer 24 hours notice of any change in credit arrangements with the Buyer, should MG in its reasonable opinion consider such action necessary or desirable.
- 2.7 MG shall invoice the Buyer for Produce supplied to the Buyer pursuant to these terms and conditions. The Buyer shall not issue a Buyer Created Tax Invoice for Produce supplied to the Buyer pursuant to these terms and conditions.

### **3. Interest on Late Payments**

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- 3.1 Where the Buyer fails to make payment of any monies owing for the sale of Produce pursuant to these terms and conditions, the Buyer shall pay interest to MG at the Interest Rate compounding daily from the date that the payment was due until the actual date of payment.

- 3.2 The Buyer indemnifies MG, and shall keep MG indemnified, against all costs, losses and expenses (including legal, debt collection and other costs and expenses) in respect of the recovery of, or attempting to recover, any monies owing by the Buyer under these terms and conditions.

### **4. MG Premises Rules**

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- 4.1 Where the Buyer is on MG Premises, the Buyer shall:
- (a) work safely and report any hazards, accidents or injuries to the appropriate MG representative at the MG Premises;
  - (b) comply with MG's health and safety policies notified to the Buyer from time to time and shall ensure that all information on health and safety provided to the Buyer is conveyed to the Buyer's employees and agents attending the relevant MG Premises; and
  - (c) comply with all reasonable rules relating to conduct at that MG Premises, as notified to the Buyer.

Such notifications may be made by MG either directly to the Buyer or by the rules being displayed in writing at a prominent place or places at the relevant MG Premises.

### **5. Use of MG equipment**

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- 5.1 The Buyer shall only utilise any equipment ("the Equipment") owned or in the possession of MG with the consent of MG and in accordance with MG's health and safety policies notified to the Buyer and any directions or instruction given by MG from time to time. The Buyer shall ensure that the person operating the Equipment is qualified to do so.
- 5.2 The Buyer utilises the Equipment entirely at its risk and indemnifies MG, and shall keep MG indemnified, from all direct or indirect losses, costs or damages incurred or suffered by MG in connection with, or arising from, or in relation to, the use of the Equipment by the Buyer however arising.



## 6. Removal of Produce from MG's Premises

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- 6.1 Unless MG agrees otherwise, the Buyer will be responsible for removing all Produce purchased from MG's Premises on the day of sale unless prior arrangements have been made with MG. Where Produce is left by a Buyer on MG's Premises, either with MG's agreement or without, MG shall be under no liability or responsibility to the Buyer whether as bailee or otherwise for the Produce or loss. In such circumstances, risk in the Produce shall transfer to the Buyer at the point the Buyer or its agent took or ought to have taken possession of the Produce notwithstanding clause 8.1.
- 6.2 No Produce shall be removed from MG's Premises without the required documentation of the sale having been executed by MG.
- 6.3 The Buyer authorises MG to inspect any vehicle at MG Premises for the purpose of verifying that the Produce in the vehicle accords with the purchases made by the Buyer. MG undertakes not to abuse this power, and to at all times when utilizing this power, act in a proper and reasonable manner.

## 7. Claims

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- 7.1 If a Buyer wishes to claim it has not received the quantity or quality or type of Produce for which it has been charged or wishes to make any other claim in accordance with these terms and conditions, the Buyer shall make such claim to MG within 24 hours from the time that the Produce was purchased. If the Buyer fails to lodge the claim within that specified period, the Buyer shall not be entitled to make any claim against MG or a Grower in relation to the Produce.
- 7.2 Where a claim has been lodged by a Buyer in accordance with these terms and conditions, MG shall in good faith investigate the claim and where it establishes that a claim is valid having regard to these terms and conditions, it shall (either on a Grower's behalf in respect of consignment sales or on its own behalf as appropriate) elect to do one of the following things: give the Buyer a credit in the amount representing the Produce; take back the Produce supplied and provide a credit; or take back the Produce supplied and replace it with the same type and quantity and grade of Produce if MG has the same type and quantity and grade of Produce available to supply to the Buyer. Beyond giving such credit or replacing Produce MG shall

have no further liability to the Buyer. It is for MG to determine, in its absolute discretion, whether it will replace Produce and not be obliged to supply extra or replacement Produce to the Buyer.

## 8. Risk and Title in the Produce

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- 8.1 Risk in respect of the Produce shall pass to the Buyer: at the time the Produce is delivered to the Buyer if MG is delivering or arranging the delivery of the Produce; or at the time the Buyer or its agent takes, or ought to have taken, possession of the Produce irrespective of whether the Produce was left on MG's Premises after the point possession of the Produce was taken or ought to have been taken by the Buyer or its agent.
- 8.2 Ownership and title in the Produce shall not pass upon delivery, but shall remain with MG or the Grower (as appropriate) until payment of all monies owing in respect of Produce supplied under these terms and conditions have been made. Until the Produce is paid for in full:
- (a) the relationship between MG (either in its own capacity or as agent for the Grower) and the Buyer shall be a fiduciary relationship, and the Buyer may sell, deal or process the Produce in a fiduciary capacity only;
  - (b) the Buyer shall store such Produce separately in a manner consistent with the Produce being the property of MG (either in its own capacity or as agent for the Grower) and ensure such Produce is able to be separately identified;
  - (c) on a sale or other realisation of the Produce, the Buyer shall identify and separately account to MG (either in its own capacity or as agent for the Grower) for the proceeds of sale and MG shall be entitled to trace such proceeds of sale; and
  - (d) MG will be given right of entry to inspect and/or remove Produce from any premises in which Produce is situated prior to title passing to the Buyer and this shall represent an irrevocable licence.



- 8.3 Without limiting anything else in these terms and conditions, the Buyer:
- (a) agrees that these terms and conditions create, in favour of MG, a security interest in all present and after acquired Produce sold by MG to the Buyer and all proceeds from that Produce;
  - (b) grants MG a security interest in all present and after acquired Produce supplied by MG to the Buyer as agent for a Grower or Growers and all proceeds from that Produce to secure payment of all monies owing in respect of Produce supplied under these terms and conditions; and
  - (c) grants MG a security interest over the Buyer's shares in MG (if any) to secure payment of all monies owing in respect of Produce sold and/or supplied under these terms and conditions. The Buyer agrees not to deal with its shares in MG without MG's prior written consent.

## 9. Hire Equipment

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- 9.1 The Buyer authorises MG to do all things MG determines necessary and/or appropriate to utilise and account for Hire Equipment and facilitate the operation of the Hire Equipment system.
- 9.2 MG reserves the right to: charge a reasonable fee to the Buyer for providing the services relating to the transfer of the Hire Equipment to the Buyer (such services include the administration associated with handling Hire Equipment and liaising with the Hire Equipment Company); and recover a fee from the Hire Equipment Company for supplying information, handling Hire Equipment and facilitating the operation of the Hire Equipment system.
- 9.3 MG may obtain from, and give to, the Hire Equipment Company information about the Buyer from time to time and as and when MG considers necessary and the Buyer consents to the exchange of information about the Buyer between MG and the Hire Equipment Company.

## 10. Warranties

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- 10.1 Where a Buyer or its agent purchases the Produce from MG's Premises or direct from the Grower the Buyer acknowledges that it or its agent has inspected the Produce and has determined to purchase the Produce in reliance on their own skill and experience and has not relied on any representations or warranties made by MG, and shall have no claim against MG and/or the Grower in relation to the quality of the Produce. Where MG delivers the Produce, or arranges the delivery of the Produce, without the Buyer or its agent having inspected the Produce, the Buyer must lodge any claim in relation to the quality of the Produce within 24 hours of delivery pursuant to clause 7.1.
- 10.2 Without limiting the generality of clause 10.1, no warranty is given, and MG and the Grower shall not be liable for:
- (a) Produce which has been especially designated due to its quality;
  - (b) loss caused by factors beyond MG or a Grower's control;
  - (c) failure to deliver Produce by any specified dates; and
  - (d) any indirect or consequential loss of any kind.
- 10.3 In the event MG or a Grower has any liability to a Buyer pursuant to the terms and conditions, the total liability of MG and/or a Grower in relation to the supply of Produce under these terms and conditions is limited at MG's option to either:
- (a) replacing the defective or damaged Produce; or
  - (b) refunding the price of the defective or damaged Produce, either in cash or by the provision of a credit.
- 10.4 Notwithstanding any other provision in these terms and conditions where MG is selling the Produce as agent for a Grower, the Buyer agrees that MG attracts no liability to the Buyer as a principal for failure to supply, delay in supply, failure in quality or otherwise.



## SECTION B

### DELIVERY OF PRODUCE BY MG

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#### 1. Delivery of Produce

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- 1.1 Where MG has agreed to deliver or arrange for the delivery of the Produce to a place nominated by the Buyer, the terms and conditions set out in this Section B shall apply with respect to the delivery of the Produce together with the terms set out in Section C. MG may either itself transport the Produce or it may appoint an agent for this purpose.
- 1.2 For the purposes of this Section B "Act" shall mean the Carriage of Goods Act 1979.

#### 2. Payment

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- 2.1 MG reserves the right to charge the Buyer a Handling Fee. The Handling Fee can be either as recorded on the invoice in relation to the sale of the Produce or on a separate invoice.
- 2.2 Payment in respect of the Handling Fee shall be made at the time payment for the Produce is due in accordance with clause 2.2 in Section A. Clauses 3.1 and 3.2 in Section A shall apply in relation to any outstanding Handling Fees as if the monies outstanding were monies owing in relation to the sale of Produce.
- 2.3 MG reserves the right to charge the freight company, any supplier and/or any Buyer a reasonable fee for administration and other costs associated with and in relation to the collection and/or delivery of Produce.

#### 3. Limited Carrier's Risk

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- 3.1 MG shall deliver or arrange for the delivery of Produce and such delivery shall be "at limited carrier's risk" as defined in the Act unless the Buyer or its agent signs a document relating to the transportation of the Produce containing a statement on the following terms:  
*"The Produce shall be carried at "owner's risk"."*
- 3.2 Where Produce is carried at "owner's risk" this means that MG will pay no compensation if the Produce is lost or damaged unless it is intentionally lost or damaged by MG.

- 3.3 Where Produce is transported at "limited carrier's risk":
- (a) MG shall, to the extent permitted by law, not be liable to the Buyer for any damage to, loss of, deterioration, mis-delivery, delay in delivery or non-delivery of the Produce whether caused by MG's negligence or otherwise; and
- (b) only to the extent MG is liable under the Act notwithstanding clause 3.3(a) above, MG shall only be liable to the Buyer up to a maximum amount of \$1,500 or such other amount as may be specified from time to time by Section 15(1) of the Act for each unit of Produce (as defined in the Act) lost or damaged by MG but MG shall not be otherwise liable for any damage to, loss of, deterioration, mis-delivery, delay in delivery or non-delivery of the Produce whether caused by MG's negligence or otherwise.
- 3.4 MG shall not be liable for any consequential or indirect loss suffered by the Buyer relating to the delivery of the Produce and shall have no liability for such loss to the Buyer if delivery of the Produce is delayed or not made at the agreed time.

#### 4. Notification of claim

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- 4.1 Any notification of any claim by the Buyer in relation to damage caused to the Produce during delivery must be notified on the terms set out in clause 7.1 in Section A. The parties expressly agree that Sections 18, 19 and 20 of the Act do not apply.

#### 5. Undelivered goods

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- 5.1 Where MG attempts to deliver or arrange the delivery of Produce to a Buyer's premises pursuant to these terms and conditions, but the Buyer is unable or unwilling to accept delivery of the Produce, MG may either:
- (a) leave the Produce at the Buyer's premises with all MG's responsibilities in relation to the delivery of the Produce ceasing; or
- (b) return the Produce to MG's Premises with all risk in the Produce remaining with the Buyer, with MG entitled to charge the Buyer a reasonable fee for storing, and/or costs of storage of, the Produce.



## SECTION C

### GENERAL CLAUSES APPLYING TO SALE AND DELIVERY OF PRODUCE

#### 1. Consumer Guarantees Act

1.1 These terms and conditions have been prepared on the basis that the supply of Produce under Section A or supply of services under Sections B, under these terms and conditions, are outside the ambit of the Consumer Guarantees Act 1993 (the "CG Act"). In the event the CG Act is determined by the Courts of New Zealand to apply to any particular supply of Produce or supply of services then:

- (a) where the supply is for business purposes, the CG Act shall not apply pursuant to subsection 43 of the CG Act;
- (b) where the supply is for domestic purposes, the CG Act shall apply and shall expressly over-ride any of these terms and conditions inconsistent with it; and
- (c) where the supply is for domestic purposes, the Buyer shall contract out of the CG Act and the Buyer shall indemnify MG, and keep MG indemnified in respect of any failure to comply with this provision.

#### 2. Privacy Act

- 2.1 MG may obtain information about the Buyer from the Buyer or any source MG considers appropriate (including any credit and debt collection agencies) from time to time and as and when MG considers necessary and the Buyer consents to the disclosure of credit information about the Buyer to MG from any source.
- 2.2 The Buyer agrees that MG may use any information it has about the Buyer relating to the Buyer and give that information to any other person (including any credit or debt collection agency and other members of the MG group of companies or any company related to, or associated with, MG), for credit assessment and debt collection purposes. The Buyer agrees that any other information collected by MG about the Buyer is accessed or collected for the use of any member of the MG

group of companies, any company associated with MG or any marketing or promotions agency engaged by MG, including for direct marketing activities.

- 2.3 The Buyer must notify MG of any change in circumstances that may affect the accuracy of the information provided by the Buyer to MG, any member of the MG group of companies, or any company related to, or associated with, MG. If the Buyer is an individual (i.e. a natural person) the Buyer has rights under the Privacy Act 1993 to access and request the correction of any personal information which MG or any company related to MG holds about the Buyer.
- 2.4 The Buyer consents to the disclosure by MG of information about the Buyer as is necessary for, or ancillary to, MG's provision of Produce to the Buyer or MG's business.

#### 3. Commencement and variation of terms and conditions

- 3.1 These terms and conditions will come into full force and effect on the date stated on the front page and will replace all existing terms and conditions. These terms and conditions may be varied by MG by the giving of 10 business days notice by publication of the changes on MG's website.

#### 4. Acceptance of terms and conditions

- 4.1 The Buyer acknowledges and agrees that: accepting any delivery of Produce from MG or a Grower; purchasing Produce from MG; making or accepting any payment in respect of the supply of Produce, freight and/or the Hire Equipment; and/or completing a Buyer Application Form by the Buyer, will be deemed acceptance of these terms and conditions by the Buyer and these terms and conditions sale prevail over any terms and conditions of the Buyer.



## 5. Dispute resolution

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- 5.1 No party shall commence any court or arbitration proceedings related to a dispute arising out of or in connection with the supply of Produce or these terms and conditions unless that party has first complied with this clause.
- 5.2 If any dispute arises out of or in connection with the supply of Produce or these terms and conditions (not being a dispute between a Supplier (other than MG) and a Buyer), MG and the Buyer shall endeavour to resolve the dispute by way of mediation in terms of the LEADR New Zealand Incorporated standard mediation agreement. Either party may initiate mediation by giving written notice to the other party. The mediator and the mediator's fee shall be agreed by the parties, but if they cannot agree within 5 business days after mediation has been initiated, then the mediator shall be appointed and the mediator's fee determined by the then Chair of LEADR New Zealand Incorporated.
- 5.3 If the dispute is not resolved within 15 business days of the appointment of a mediator, or within a longer period agreed in writing by the parties, then the dispute will be determined in accordance with the Arbitration Act 1996 (excluding clauses 4 and 5 of the Second Schedule of that Act) subject to the following.
- (a) The parties shall endeavour to agree on the appointment of an arbitrator within 10 business days of the dispute being referred to arbitration. If the parties are unable to agree on an arbitrator, an arbitrator shall be appointed by the President for the time being of the New Zealand Law Society at the request of either party.
- (b) Each of the parties to the dispute shall within 10 business days of the appointment of an arbitrator serve written submissions with accompanying documentary evidence on the other party and the arbitrator (the "initial submissions").
- (c) Each party shall have 5 business days from the date of service of the last initial submission to respond to the initial submissions of the other party and to serve further written submissions on the other party and the arbitrator ("the counter submissions").

(d) On the basis of the initial submissions and the counter submissions, the arbitrator shall determine the dispute within 10 business days of receiving the last counter submission or within 15 business days of the last initial submission if no counter submissions are served. There shall be no formal hearing or any variation to this dispute process unless agreed in writing by the parties.

- 5.4 The provisions of this clause 5 shall not be construed or operate to prevent a party from seeking a temporary restraining order or injunctive or other equitable relief with respect to a breach (or attempted breach) of these terms and conditions by the other party.

## 6. General

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- 6.1 **Third party rights:** Where MG is selling Produce for and on behalf of the Grower, the Buyer acknowledges that the Grower is entitled to the benefit of these terms and conditions and may seek to enforce these terms and conditions against the Buyer pursuant to Section 4 of the Contracts (Privity) Act 1982. In all other respects except as expressly provided by these terms and conditions the parties do not intend to create rights and/or grant remedies to any third parties or beneficiary of these terms and conditions and all covenants, stipulations, promises and agreements contained in these terms and conditions shall be for the sole and exclusive benefit of MG, the Growers and the Buyers and their successors and permitted assigns.
- 6.2 **Force Majeure:** Notwithstanding any other provision of these terms and conditions, non-performance by either party of any of its obligations (other than to pay money) under these terms and conditions shall be excused, without liability for non-performance, during the time and to the extent that such performance is prevented, wholly or substantially, by Force Majeure.
- 6.3 The party claiming the benefit of clause 6.2 shall promptly give written notice to the other party specifying the cause and extent of its inability to





perform any of its obligations under these terms and conditions and the likely duration of such non-performance. In the meantime such party shall take all reasonable steps to remedy or abate the Force Majeure.

6.4 No party shall, by virtue of this clause, be required against its will to settle any strike, lockout or other industrial disturbances.

6.5 Performance of any obligation affected by Force Majeure shall be resumed as soon as reasonably possible after the termination or abatement of the Force Majeure.

6.6 **Entire agreement:** These terms and conditions supersede and extinguish all earlier negotiations, understandings and agreements and shall prevail over any terms and conditions provided by the Buyer.

6.7 **Savings clause:** If any provision of these terms and conditions is or becomes or is declared invalid, unenforceable or illegal such invalidity, unenforceability or illegality shall not prejudice or affect the remaining provisions of these terms and conditions which shall remain in full force and effect notwithstanding such invalidity, unenforceability or legality.

6.8 **No assignment by Buyer:** A Buyer shall not be entitled to assign to any other person any rights the Buyer may have under a Buyer Application Form on credit terms. A change in effective control of a Buyer shall be deemed assignment in breach of these terms and conditions, entitling MG to cancel any credit arrangement it may have with the Buyer and to demand immediate repayment of all monies outstanding.

6.9 **Intellectual property:** The Buyer acknowledges and agrees that the use of any trade mark, brand, logo or other intellectual property right which MG or any subsidiary of or entity related to or associated with MG owns or has the right to use, including any trade mark, brand, logo or other intellectual property right of a Grower, ("MG Intellectual Property") by the Buyer and/or in relation to the Produce purchased by the Buyer does not give the Buyer any ownership right in the MG Intellectual Property or the right to use the MG Intellectual Property for any purpose other than the purpose that the right to use the MG Intellectual Property was granted.

#### 6.10 **Personal Property Securities Register:**

The Buyer undertakes to:

- (a) sign any further documents and/or provide any further information (which information the Buyer warrants to be complete, accurate and up-to-date in all respects) which MG may reasonably require to enable registration of a financing statement or financing change statement on the Personal Property Securities Register;
- (b) not register a financing change statement or a change demand in respect of the Produce without MG's prior written consent; and
- (c) give MG not less than 14 days prior written notice of any proposed change in the Buyer's name and/or any other change in the Buyer's details (including, but not limited to, changes in the Buyer's address, facsimile number, trading name or business practice).

#### 6.11 **Waiver and contracting out of PPSA**

- (a) Unless otherwise agreed to in writing by MG, the Buyer waives its right to receive a verification statement in respect of any financing statement or financing change statement relating to the security interest created by these terms and conditions.
- (b) The Buyer agrees that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to these terms and conditions and, with MG's agreement, contracts out of such sections.
- (c) To the maximum extent permitted by law, the Buyer waives its rights and, with MG's agreement, contracts out of the Buyer's rights under the PPSA to:
  - (i) receive notice of MG's proposal to retain any Produce under section 120(2);
  - (ii) object to MG's proposal to retain any Produce under section 121; and
  - (iii) redeem any Produce under section 132.
- (d) The Buyer and MG agree that section 109(1) of the PPSA is contracted out of in respect of particular Produce if, and only for so long as,



MG is not the secured party with priority over all other secured parties in respect of that Produce.

- 6.12 **Fees and Charges:** The Buyer agrees to pay such fees and charges associated with the supply of Produce by MG under these terms and conditions as are stipulated by MG from time to time in MG's tariff schedule. MG may also, from time to time, vary any such fees and charges. Any tariff schedule prepared by MG is deemed to be incorporated in, and to form part of, these terms and conditions.
- 6.13 **Limitation of liability:** MG's liability to the Buyer under these terms and conditions or however arising is limited to the lesser of: the sales price for the particular Produce to which the Buyer's claim relates; and the direct loss or damage suffered or incurred by the Buyer. All warranties, conditions and other terms implied by statute or common law and any express terms, representations, warranties or undertakings made by MG that are not made in writing are, to the fullest extent permitted by law, expressly excluded from these terms and conditions.
- 6.14 **Set off:** MG shall, prior to paying any monies to the Buyer under these terms and conditions, be entitled to first apply any such monies in reduction of any amounts owing by the Buyer, or any person related to the Buyer, to MG, or any of MG's related companies, however arising prior to accounting to the Buyer for any balance. In the event the Buyer holds shares in MG, the Buyer grants MG a security interest in and over the MG shares held by the Buyer as security for any monies owing by the Buyer or any person related to the Buyer to MG from time to time. Clauses 6.10 and 6.11 of these terms and conditions shall apply to any security interest granted to MG under this clause.
- 6.15 **No waiver:** A failure, delay or indulgence by MG in exercising any power or right under these terms and conditions will not operate as a waiver of that power or right. A single exercise or partial exercise of any power or right under these terms and conditions will not preclude further exercises of that power or right or the exercise of any other power or right.

- 6.16 **Governing law:** These terms and conditions are governed by New Zealand law and the Courts of New Zealand shall have non-exclusive jurisdiction in any proceedings arising from or in relation to the supply of Produce or these terms and conditions.

## 7. Definitions and Interpretation

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- 7.1 In these terms and conditions unless the context otherwise requires:
- Buyer** means:
- (a) The purchaser of Produce from MG whether MG is acting as an agent for a Grower or Growers or on its own account;
  - (b) A person having Produce delivered, or arranged to be delivered, by MG;
- Buyer Application Form** means an application by a person to MG to purchase Produce pursuant to these terms and conditions, on such form as is prescribed by MG from time to time;
- Equipment** means crates, bins, cages, pallets or other equipment associated with the storage or transport of Produce;
- Force Majeure** means any event or circumstance beyond the control of the party claiming the benefit of the force majeure clause in these terms and conditions which that party is unable to prevent or overcome by the exercise of reasonable care and at reasonable cost;
- Grower or Growers** means a Grower or Growers of Produce being purchased by a Buyer in the context of consignment sales by MG to the Buyer on behalf of a Grower or Growers of Produce;
- Handling Fee** means any fee implemented from time to time by MG in relation to: the handling of Produce from the time of receipt to and including the time of despatch; and/or the administration associated with the delivery, handling and/or despatch of Produce;
- Hire Equipment Company** means an entity hiring Hire Equipment either directly to the Buyer or a Grower;



**Interest Rate** means 15% per annum or such other interest rate notified by MG from time to time;

**MG** means Market Gardeners Limited trading as MG Marketing, its assigns or successors and where appropriate its agents or sub-contractors;

**MG Premises** means the premises from which MG conducts its business in relation to the sale of any relevant Produce;

**Produce** means all fruit and vegetables and other associated items or any other item acquired by the Buyer from MG either in MG's capacity as agent for a Grower or Growers or on its own account, provided that:

- (a) where, but only for so long as, the Produce acquired is the inventory of the Buyer, then all references to Produce in these terms and conditions shall, in respect of that Produce be read as references to inventory; and
- (b) where the Produce acquired is, at any time, not inventory, then all references to Produce in these terms and conditions shall mean the Produce described in any one or more of the relevant order forms, packing slips or invoices (or their equivalent, whatever called) relating to that Produce, on the basis that each such document shall be deemed to be incorporated in, and form part of, these terms and conditions; and

**PPSA** means the Personal Property Securities Act 1999.

7.2 Where there is more than one Buyer then the obligations on them under these terms and conditions shall be joint and several.

7.3 In the interpretation of these terms and conditions:

- (a) words importing the singular or plural number shall be deemed to include the plural or singular number respectively;
- (b) words importing the gender shall include every gender and the word "person" shall incorporate corporation and vice versa;
- (c) referring to anything after the word "including" does not limit what else might be included;
- (d) the headings appearing in these terms and conditions are inserted only as a matter of convenience and in no way define, limit or describe the scope or intent of the clauses of these terms and conditions or in any way affect these terms and conditions;
- (e) all prices charged by MG are in New Zealand dollars and are exclusive of GST unless otherwise stated in writing;
- (f) unless context otherwise requires words and phrases used in these terms and conditions shall have the meanings given to them in, or by virtue of, the PPSA; and
- (g) a reference to an enactment or to any regulations is a reference to that enactment or those regulations as amended, or to any enactment or regulations substituted for that enactment or regulations.

