

Turners & Growers Fresh Limited



Turners &
Growers

Standard Terms and Conditions of Trade with Buyers

1st January 2007

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INTRODUCTION

This document sets out the terms and conditions on which Turners & Growers Fresh Limited ("T&G") will sell Product to Buyers (each as defined below), which together with any documents, additional terms or statements referred to herein, will form T&G's terms and conditions of trade with Buyers ("Terms and Conditions").

These Terms and Conditions come into effect in 1 May 2005 and will replace all existing terms and conditions between T&G and any Buyer and will apply to all T&G business units (except for the Exports Division) where those units are contracting with Buyers, unless otherwise expressly consented to in writing by T&G.

T&G is a merchant having operations located throughout New Zealand. In the course of its business it:

- a) sells Product on consignment on behalf of Suppliers to Buyers (hereinafter referred to as "sales on consignment");
- b) purchases Product from Suppliers as principal and sells such Product on to Buyers (hereinafter referred to as "trade sale");
- c) hires out Container Equipment; and
- d) transports Product.

1.0 DEFINITIONS

1.1 In these Terms and Conditions the following words bear the following meanings:

- "Business Day" means any day on which registered banks in New Zealand are open for general banking business in Auckland, excluding bank branches that choose to offer service on a weekend day.
- "Buyer" means the purchaser of Product from a Supplier via the T&G auction or trade markets.
- "Buyer Account Application Form" means the form completed by the Buyer to activate a buying account through which the Buyer may purchase Products from T&G, which must include a direct debit authority, personal guarantees and GST registration, where appropriate.
- "Carrier Agent" means any carrier contracted by the Buyer to transport Product from T&G's facilities to a designated destination.
- "Container Equipment" means all wooden or plastic hire containers, pallets, cages and flower hire buckets that are returnable and officially approved by T&G.
- "Customer Services" means the Customer Services business unit at T&G whose contact number is 0508 800 100 as updated from time to time.
- "Floramax" means Floramax, the flower auction division of T&G and any person authorised by it to act on its behalf.

- “Food Safety Practices” means T&G programme to provide safe food items and meet the requirements of the NZ Food Safety Authority for exemption from the Food Regulations 1974, as may be notified to the Buyer and updated from time to time.
- “Force Majeure” means any circumstances or events beyond the reasonable control of T&G, including without limitation any acts of God, or the public enemy, flood, earthquake, storm, cyclone, tornado, hurricane, lightning, fire, explosion, epidemic, war, embargos, riot or civil disturbance, lock outs, strikes or other labour disputes or industrial actions.
- “Fruit Case Company” means the Fruit Case Company, a division of T&G and any person authorised by it to act on its behalf.
- “GST” means goods and services tax pursuant to the Goods and Services Act 1985.
- “Product” means fresh fruit and vegetables and any other plant produce and/or flowers and/or food items and/or associated items.
- “Statement Date” means the date on which T&G sends the Buyer an invoice/statement setting out the Product purchased by the Buyer since the previous statement date and any other associated transactions for which the Buyer owes T&G any moneys.
- “Supplier” means the producer/vendor of Product on whose behalf T&G sells Product as sales on consignment or T&G, where T&G sells Product on its own behalf.
- “T&G” means Turners & Growers Fresh Limited and any person authorised by it to act on its behalf.
- “TAG Specifications” means the current T&G TAG Quality Assurance system and all amendments thereto published on the T&G website www.turnersandgrowers.com from time to time.
- “T&G Limited Business Day” means the days of the week that a T&G site is open for business over a 24 hour period, which may vary from site to site.

1.2 In these Terms and Conditions the singular will include the plural and reference to a “party” or the “parties” shall mean either each of T&G or the Buyer or T&G and the Buyer together.

2.0 ACCEPTANCE OF TERMS AND CONDITIONS

2.1 T&G will not be obliged to sell any Product to a Buyer, unless that Buyer has completed and executed an approved Buyer Account Application Form and any other related documents and become an authorised account holder.

2.2 The Buyer acknowledges and agrees that:

- a) any purchase of Product by the Buyer from T&G; and/or
- b) the completion and execution of any Buyer Account Application Form by the Buyer,

will be deemed to be an acceptance of these Terms and Conditions by the Buyer from the time when such purchase or execution took place.

- 2.3. T&G may alter these Terms and Conditions by giving notice of those alteration(s) to the Buyer and any subsequent dealing by the Buyer with T&G will be deemed to be acceptance of the alteration(s) to these Terms and Conditions.

3.0 CONSIGNMENT/TRADING

- 3.1 T&G generally sell as an agent and intermediary to effect the sale on consignment of a Supplier's Product to the Buyer. T&G will not be liable to the Buyer as a principal for any failure to supply, delay in supply, failure in quality or quantity or otherwise.

4.0 PRICE

- 4.1 Unless otherwise expressly agreed by T&G in writing pursuant to clause 4.2, all applicable prices, fees, levies, charges and taxes will be in accordance with T&G's then current list for the same at the time a contract is made between the Supplier and T&G and as updated from time to time. T&G's current price list and any associated fees, levies, charges or taxes is subject to alteration without notice. T&G may charge the Buyer any applicable handling fees in accordance with the terms set out on T&G's website or available from T&G's offices from time to time.

- 4.2 T&G may, at the Buyer's request, give a written quotation for the Product. Where T&G elects to give a written quotation, that quotation:

- a) is an offer and T&G must receive the Buyer's acceptance of it before any contract for the sale and purchase of that Product arises between T&G and the Buyer;
- b) may be withdrawn by T&G at any time prior to receipt of acceptance;
- c) will lapse if acceptance is not received within two (2) Business Days of its date, unless T&G agree to an extension of the offer period; and
- d) will, if accepted, govern the base price of the Product in respect of that contract and any additional associated fees, levies, charges or taxes will be charged separately.

- 4.3 T&G will charge the Buyer and the Buyer will pay to T&G any usage or deposit payable to the Fruit Case Company in relation to the Container Equipment in which Product is purchased.

- 4.4 The Buyer will pay to T&G such usage or deposit fees as may be charged by T&G the Fruit Case Company and other Container Equipment Suppliers or Floramax from time to time for Container Equipment hire and use, in addition to the price of the Product and any associated fees, levies, charges or taxes and any GST thereon in accordance with clause 7 of these Terms and Conditions, or in accordance with any other terms that may be extended to the Buyer by T&G from time to time.

5.0 DELIVERY AND RISK

- 5.1 Without prejudice to any express terms that may be agreed between the parties from time to time, delivery of the Product will be deemed to occur when the Product is either:
- a) collected from T&G's premises by the Buyer, its employee, or Carrier Agent; or
 - b) where T&G (or an associated entity) has agreed to deliver the Product to the Buyer, when the Product is delivered to the agreed delivery point, whichever occurs first.
- 5.2 Upon delivery:
- a) the Buyer will be entitled to possession of the Product; and
 - b) risk in the Product will pass to the Buyer.
- 5.3 If the Buyer has failed to take delivery of the Product from T&G's site on the day of the sale and delivery of such Product, then T&G will be entitled, by notice to the Buyer, to treat the contract for that Product as repudiated by the Buyer. T&G may, at its option and without prejudice to its rights and remedies in respect of such repudiation, sell the Product and retain the proceeds of the sale.
- 5.4 If Product is left at a T&G site by a Buyer for 24 hours or more, either with or without T&G's agreement, then T&G will be under no liability or responsibility to the Buyer whether as bailee or otherwise for the Product, or any loss or deterioration thereof, whether or not any loss or damage in respect of that Product is caused by the negligence of T&G or its agent(s) or employees.

6.0 PAYMENT AND TITLE

- 6.1 Unless otherwise agreed in writing, the Buyer will pay to T&G by direct debit on the Monday following the Statement Date the full price for all Product and for Container Equipment deposits and hire fees, together with all applicable taxes, levies, site, handling and picking fees and any other fees and charges which may be set out in any invoice from T&G.
- 6.2 Where T&G extends credit to a Buyer, that credit may be withdrawn without prior notice in respect of any overdue account and will be reinstated by T&G in its sole discretion, if and when all outstanding amounts are paid by the Buyer.
- 6.3 Where the Buyer pays for Product or Container Equipment deposit and hire fees and for any associated taxes, fees, levies, costs and charges on credit payment terms, the Buyer will be deemed to do so on the credit payment terms and conditions set out in the Buyer's Account Application Form or on such other terms as may be agreed in writing with the Buyer from time to time.
- 6.4 If payment is not made in full by the due date, T&G is entitled to charge the Buyer a late payment fee on the unpaid overdue balance from the due date for payment at the rate of 15% pa on the overdue balance, plus any GST thereon, compounding weekly on the unpaid balance owing on the first day of each

week until payment in full is received by T&G. T&G may vary such late payment fee without notice, at T&G's discretion.

- 6.5 Until T&G receives payment in full of the purchase price of the Product (including all applicable taxes, fees, charges, costs and levies) and all other amounts owing to T&G from the Buyer and notwithstanding any other provision in these Terms and Conditions, title in the Product will not pass to the Buyer but will remain with the Supplier (or T&G, in the event of a trade sale) and:
- a) where the Buyer is in possession of the Product, the Buyer will hold the Product as bailee for the Supplier or T&G, as the case may be; and
 - b) unless otherwise notified in writing, T&G is authorised to sell the Product in the ordinary course of business, without notice to the Buyer; and
 - c) the Buyer irrevocably authorises T&G or T&G's employees or agents to enter the Buyer's premises to search for and remove any Product that is T&G's property, without being liable in any way to the Buyer. The Buyer agrees to indemnify T&G against all costs of claims from any person in relation to T&G's exercise of its rights under this clause.
- 6.6 Notwithstanding clause 6.5 above, all payments will become due and payable to T&G in the event that:
- a) a receiver is appointed over any of the Buyer's assets or undertaking;
 - b) a liquidator is appointed or the Buyer goes into voluntary liquidation;
 - c) the Buyer makes or attempts to make an arrangement or composition with creditors; or
 - d) the Buyer becomes insolvent within the meaning of the Insolvency Act 1967 or the Companies Act 1993, or commits any act of bankruptcy.
- 6.7 The Buyer will reimburse T&G for all costs and expenses incurred by T&G (including legal costs calculated on a solicitor and client basis and late payment penalties) in recovering or attempting to recover payment from the Buyer.
- 6.8 Where money is owed to the Buyer by the Fruit Case Company by way of Container Equipment deposit return or otherwise, the Buyer irrevocably authorizes the Fruit Case Company to pay such money to T&G, as a reduction of any amount that the Buyer may owe to T&G from time to time.
- 6.9 If T&G is owed any money by the Buyer, has incurred any cost, expense or has any claim against the Buyer, or any contingent liability arising out of a breach by the Buyer of these Terms and Conditions ("**Liability**") and such Liability remains outstanding for more than ten (10) Business Days from when it fell due or was incurred, then the Buyer authorises T&G to set off such Liability from any sum owed to the Buyer by T&G or any trading division or affiliated company of Turners & Growers Fresh Limited and its successors in title, from time to time.

7.0 SECURITY INTERESTS

- 7.1 Where T&G extends the Buyer any credit, the Buyer agrees to grant to T&G, if T&G so requires at any time, a security interest in all Product supplied by T&G to the Buyer from time to time. To protect T&G's security interest, the Buyer agrees to allow T&G to register a financing statement under the New Zealand Personal Property Securities Act 1999 ("PPSA").
- 7.2 The Buyer must, upon T&G's request, promptly give T&G all assistance and information as may be necessary to register T&G's security interest.
- 7.3 The Buyer must pay to T&G promptly on request all of T&G's costs in registering the security interest and the costs of enforcing or attempting to enforce T&G's rights under these Terms and Conditions and the security interest.
- 7.4 In respect of registration in New Zealand (where applicable), the Buyer agrees that sections 114(a), 121, 131 of the PPSA will not apply to the security interests created by these Terms and Conditions and the Buyer waives its right to receive a verification statement under section 148 of the PPSA.

8.0 RETURNED PRODUCT

- 8.1 Where a Buyer has any query in relation to their account or the Product purchased from T&G, their first point of contact should be T&G's Customer Services.
- 8.2 If a Buyer believes it has a valid reason to return to T&G any Product purchased from T&G, **then the Buyer must notify Customer Services of its intention to return the Product and its reason for doing so within three (3) hours** of delivery taking place in accordance with clause 5.1 of these Terms and Conditions.
- 8.3 The Buyer must procure that any Product it intends to return to T&G is back on a T&G site **within 24 hours** of the time at which the Buyer notified T&G of its intention to return the Product, if the Buyer's place of business is within a 100 km radius of such site or **within 48 hours** if the Buyer's place of business is more than 100km away from such site.
- 8.4 T&G will not consider any claim for returned Product made by the Buyer unless the original dispatch docket for the Product accompanies the Product in question and the Buyer has otherwise strictly complied with all the procedures for returned Product set out in these Terms and Conditions or as otherwise notified to the Buyer from time to time. The Buyer's failure to comply with these obligations will absolve T&G of all liability in respect of such returned Product.
- 8.5 T&G may conduct a TAG quality assurance inspection prior to making any decision on the validity of the Buyer's claim.
- 8.6 If T&G, at its sole discretion, deems the Buyer's claim to be valid, T&G's liability for any such returned Products will, in all circumstances, be limited to crediting the Buyer with the invoice value of the returned Products in question. Beyond giving such credit, T&G will have no further liability whether in tort, contract

of otherwise to the Buyer for any loss, damage, cost or expense arising from any returned Product and in particular, T&G will not be obliged to supply any replacement product to the Buyer.

9.0 SHORT SUPPLY

- 9.1 Where the Buyer claims it has not received the quantity of Product it purchased from T&G, it will notify T&G of its claim **within one (1) Business Day** from the time that the Product is delivered in accordance with clause 5.1 of the Terms and Conditions.
- 9.2 T&G will not consider any claim for short supply made by the Buyer, unless the original dispatch docket for the relevant Product accompanies the Buyer's written notification to T&G and the Buyer has otherwise strictly complied with all the procedures for making such a claim set out in these Terms and Conditions or as otherwise notified to the Buyer from time to time. The Buyer's failure to comply with these obligations will absolve T&G from all liability in respect of such short supply or of any obligation to deal with that claim.
- 9.3 If T&G, at its sole discretion, deems the Buyer's claim to be valid, T&G's liability for any short supply will, in all circumstances, be limited to crediting the Buyer for the difference between the amount of Product charged for and the amount of Product actually supplied. Beyond giving such credit, T&G will have no further liability whether in tort, contract or otherwise to the Buyer for any loss, damage, cost or expense arising from the short supply and, in particular, T&G will not be obliged to supply any additional Product to the Buyer to make up for the shortfall in question.

10.0 UNACCEPTABLE PRACTICES

- 10.1 The Buyer will not sample any Product, nor trim or repack Product without the permission of a T&G representative. T&G reserves its rights under clause 10.3 of these Terms and Conditions in respect of any Buyer found to be contravening the Food Safety Practices.
- 10.2 The Buyer may not add or remove Product to or from the Container Equipment in which it is sold, nor change or tamper with applicable line numbers on T&G's premises. The Buyer will not remove any Product or Container Equipment from T&G's premises without completing any and all of the prescribed operating requirements for those premises, as notified to the Buyer from time to time. Any Buyer found to be in breach of the correct operating procedures for removing Product from a T&G site may be prosecuted in a court of law.
- 10.3 **T&G reserves the right to bar any person who is in breach of these Terms and Conditions at any time from any of its premises and may choose to issue any said person with a restraining trespass notice.**

11.0 USE OF FORK HOIST OR OTHER EQUIPMENT

- 11.1 Where a Buyer or Buyer's agent has express written authority from a T&G representative to use a fork hoist, mobile container moving devices or other equipment owned by or in the care of T&G ("Equipment"), such authority will be conditional on the Buyer providing that only qualified and certified operators operate such Equipment at all times.
- 11.2 The Buyer will indemnify T&G against all claims against T&G and all loss, damage, expense, cost or penalties suffered by T&G as a result of the Buyer's use of the Equipment, together with all costs incurred by T&G (including legal costs calculated on a solicitor and client basis) in dealing with any such action, unless the Buyer establishes that the relevant loss was caused by T&G's failure to properly maintain the Equipment in question.
- 11.3 The Buyer will indemnify T&G for any loss, claim, or cost or damage to, or loss of Product as a result of the Buyers or Buyer's agents' moving Product with the Equipment or of T&G's staff moving Product with T&G's Equipment on the Buyer's behalf, in instances where the load of Product is deemed by T&G (in its absolute discretion) to have been unsafely or incorrectly packaged by the Buyer, the Buyer's employee or the Buyer's agent.
- 11.4 If the Buyer or Buyer's employee or agent causes any damage to privately owned vehicles at any T&G site and/or to T&G property, plant, buildings or staff while using the Equipment, then the Buyer will indemnify T&G against all resultant losses, damages, claims or penalties suffered by T&G, together with all costs and expenses incurred by T&G (including legal costs calculated on a solicitor and client basis) arising from any such damage.

12.0 CONSUMER PROTECTION LEGISLATION

- 12.1 Where a Buyer purchases or holds itself out as purchasing Product or hiring Container Equipment from T&G for business purposes, the guarantees and provisions contained in the Consumer Guarantees Act 1993 and all amendments thereto and otherwise applicable to such purchase or hire are expressly excluded by T&G and will not apply to any dealings between T&G and the Buyer.
- 12.2 Where a Buyer purchases or holds itself out as purchasing Product or hiring Container Equipment from T&G for business purposes and subject to the Buyer's right to return Product in accordance with clause 8, Product is sold to the Buyer strictly on terms that the Buyer has satisfied itself of its suitability for its purposes.

13.0 LIMITATION OF LIABILITY AND INDEMNITY

- 13.1 T&G's entire liability to the Buyer is limited to the invoice price of the particular Product supplied by T&G to which the Buyer's claim relates, or to direct damages, whichever is less. All

warranties, conditions and other terms implied by statute or common law and any express terms, representations, warranties or undertakings made by T&G that are not expressed in writing are, to the fullest extent permitted by law, expressly excluded from these Terms and Conditions.

- 13.2 Except where the Buyer is a "Consumer" for the purposes of the Consumer Guarantees Act 1993 and subject to clause 13.1, without limitation, T&G will not be liable for:
- a) any delay in delivery;
 - b) loss or damage in transit, other than as set out in clause 6;
 - c) loss or damage caused by any event or circumstance that is beyond the reasonable control of T&G; or
 - d) any loss of profits, loss of business, product liability, or indirect or consequential loss or damage, howsoever arising.
- 13.3 T&G may, at its sole discretion:
- a) replace any returned Product, if T&G is satisfied that such Product does not meet the minimum TAG Specification accorded to them; or
 - b) refund by way of credit to the Buyer the invoice price for such Product.
- 13.4 T&G will not be liable for any returned Product or short supply under any circumstances if the Buyer has not:
- a) notified T&G of its claim in respect of such Product as soon as the Buyer became aware of the same and, in any event, within the times prescribed in these Terms and Conditions; and
 - b) included with its notice full details of the Product that is the subject matter of the claim, the basis of the alleged claim and all the documents in the Buyer's possession or control that are associated with the order and delivery of those Products, including the original dispatch docket for such Product; and
 - c) reasonably assisted T&G with investigating the Buyer's claim.
- 13.5 The Buyer will fully and completely indemnify T&G against any and all claims, proceedings, costs, expenses, losses, damages and liability (including legal fees calculated on a solicitor and client basis) arising out of, connected with or resulting from a breach by the Buyer of its obligations under these Terms and Conditions.

14.0 FORCE MAJEURE

- 14.1 T&G will not be liable for any delay or failure to perform its obligations under these Terms and Conditions by reason of any Force Majeure. Any suspension of performance by reason of this clause will be limited to the period during which the Force Majeure exists.
- 14.2 T&G may terminate the performance of its obligations in respect of the particular dispatch or order of Products to which the

Force Majeure relates, immediately by giving notice to the Buyer if the delay arising directly out of Force Majeure continues for more than five (5) consecutive Business Days.

15.0 ALTERNATIVE DISPUTE RESOLUTION

- 15.1 In the event of any dispute arising between the parties in relation to these Terms and Conditions (including the validity, breach or termination of them) the parties will, without prejudice to any other right or entitlement they may have pursuant to these Terms and Conditions or otherwise, explore whether the dispute can be resolved by agreement between them using informal dispute resolution techniques such as negotiation, mediation, independent expert appraisal or any other alternative dispute resolution technique. The rules governing any such technique adopted will be as agreed between the parties or as selected by the President of LEADR (Lawyers Engaged in Alternative Dispute Resolution - New Zealand Chapter).
- 15.2 In the event the dispute is not resolved by such agreement within fourteen (14) Business Days of written notice by one party to the other of the dispute (or such further period agreed in writing between the parties), either party may refer the dispute to arbitration. The arbitrator will be agreed between the parties within ten (10) Business Days of written notice of referral by the referring party to the other or, failing agreement, appointed by the President of the Auckland District Law Society from time to time or its successor organisation. In either case, the arbitrator will not be a person who has participated in an informal dispute resolution procedure in respect of the dispute. The arbitration shall be in English, shall take place in New Zealand and shall be in accordance with the Arbitration Act 1996, unless the parties agree otherwise.
- 15.3 Notwithstanding anything in this clause or the Arbitration Act 1996, T&G may commence court proceedings in relation to any dispute where T&G seek urgent interlocutory relief.

16.0 PRIVACY ACT

- 16.1 T&G will hold any personal information that it receives from the Buyer for the purposes of its own marketing and Product development, account administration and credit purposes. The Buyer agrees that T&G may ask for and disclose personal information about the Buyer to any person named by the Buyer as a credit reference in connection with the Buyer's account, and to any person in circumstances reasonably deemed necessary by T&G in order to protect T&G interests in respect of its relationship with the Buyer.

17.0 AUCTION TERMS

- 17.1 Notwithstanding any auction terms or Buyer's auction instructions published at www.turnersandgrowers.com or otherwise notified to Buyers at any T&G premises where auctions are held, at any auction of the Product conducted by

T&G, the highest bidder in respect of that Product will be the purchaser of the Product. If any dispute arises as to any such bid, T&G has full discretion to settle the dispute and/or to put any disputed lot of Product up for auction again.

- 17.2 At auction T&G reserves the rights, at its sole discretion, to refuse any bid, divide any lot of Product or combine any Product lots.
- 17.3 Any specific auction rules relating to flower auctions displayed in the flower markets in any of Auckland, Wellington or Christchurch or published on the website www.turnersandgrowers.com will be in addition to these Terms and Conditions in respect of the flower auctions at that particular market.

18.0 GENERAL CONDITIONS

- 18.1 **Entire Agreement:** These Terms and Conditions and any documents or materials referred to in them, constitute the entire agreement and understanding of the parties and supersedes any previous agreement between the parties relating to the subject matter of these Terms and Conditions. The Buyer acknowledges that in entering into these Terms and Conditions, it does not rely on and will not have any remedy in respect of any statement, representation, warranty, undertaking or understanding (whether or not negligently made by any person other than as expressly set out in these Terms and Conditions).
- 18.2 **Prevalence:** These Terms and Conditions will prevail over any terms and conditions contained in any order or offer made by the Buyer or any document used by the Buyer and purporting to have contractual effect.
- 18.3 **Non-waiver:** Where T&G fails to enforce any of these Terms and Conditions or fails in any way to exercise its rights under them, T&G will not be deemed to have waived those rights with respect to any subsequent breach of any Term or Condition or right.
- 18.4 **Severability:** If any clause or part of a clause of these Terms and Conditions is held to be invalid or unenforceable for whatever reason, the remaining provisions will remain in full force and effect.
- 18.5 **Governing Law:** These Terms and Conditions will be governed by and interpreted in accordance with the laws of New Zealand and both T&G and the Buyer agree to submit to the exclusive jurisdiction of the courts of New Zealand.