



Australian
Competition &
Consumer
Commission

Example Horticulture Produce Agreement – Merchant

[Note: The ACCC has prepared this template Horticulture Produce Agreement for use by growers and merchants under the Horticulture Code. This agreement sets out a best practice approach and covers the matters that are required to be included in a Horticulture Produce Agreement under the Horticulture Code.

It also contains additional clauses (in the highlighted boxes) that clarify the relationship and obligations of the parties. The Horticulture Code does not require these clauses to be included in an agreement. However, many of them relate to obligations that are imposed by the Horticulture Code and are things that the parties must do. Those that do not relate to express obligations under the Horticulture Code are included to give clarity to the agreement and cover circumstances where it is important to specify what the parties' rights and obligations are. Parties do not have to include the highlighted terms. However, we recommend that they are included.

This template agreement does not cover all the matters that may be relevant to the parties' commercial relationship. Growers and merchants can agree to add additional terms and conditions to this template agreement, as needed. However, additional terms and conditions must not be inconsistent with the Horticulture Code.]

April 2017

Example Horticulture Produce Agreement – Merchant

Grower	Merchant
Grower's Name:	Merchant's Name:
ACN (if applicable):	ACN (if applicable):
ABN (if applicable):	ABN (if applicable):
Address:	Address:
Email:	Email:
Phone:	Phone:

Terms and conditions

1. Agreement

- 1.1. For the Term of this agreement, the Grower agrees to deliver, and the Merchant agrees to buy, Horticulture Produce of the type, quantity, quality and specifications set out in this agreement or as ordered by the Merchant and confirmed in writing by the Grower from time to time, for the price/s stated in, or calculated in accordance with, this agreement.

2. Term

- 2.1. This agreement will commence on the Start Date and will continue for the Term of the agreement unless it is terminated earlier in accordance with clause 17.

Event	Date
Start Date	[insert date] or date the last party signs (whichever is the latter)
Term	This agreement will commence on the Start Date and will terminate on [insert end date] / the date the agreement is terminated under clause 17 [if there is no end date] – [Note: Delete as appropriate].

3. Merchant's reporting obligations

- 3.1. For the purposes of this agreement, the Reporting Period is [Note: Insert period: monthly/quarterly]
- 3.2. For each Reporting Period, the Merchant will give the Grower a statement for the Reporting Period, specifying for the Grower's Horticulture Produce received by the Merchant during the Reporting Period:

- (a) the quality and quantity of the Horticulture Produce bought by the Merchant
- (b) the date or dates of the purchases
- (c) the price paid for the Horticulture Produce
- (d) if the price for the Horticulture Produce was determined by a method or formula specified in subclause 5.1

- i. the gross sale price of the Horticulture Produce
- ii. the details of any Horticulture Produce not sold, and
- iii. the details of any Horticulture Produce destroyed, or to be destroyed, and the reason why the Horticulture Produce was, or is to be, destroyed, and

- (e) the date on which the Horticulture Produce was delivered to the Merchant.

3.3. The Merchant will give the statement referred to in subclause 3.2 to the Grower within the Statement Period, which is [insert number of days] following the end of the Reporting Period.

4. Merchant's other obligations

4.1. During the period the Grower's Horticulture Produce is under the Merchant's control, the Merchant will exercise all reasonable care and skill in handling and storage to ensure that the Horticulture Produce remains of the highest quality possible.

4.2. The care and skill the Merchant must exercise under subclause 4.1 must be exercised until the ownership of the Horticulture Produce passes to the Merchant.

5. Price

5.1. The price that the Merchant will pay the Grower for Horticulture Produce delivered by the Grower will be

[the amount calculated by the following method or formula [specify method or formula in detail] / the amount agreed in writing between the Merchant and the Grower before delivery of the Produce to the Merchant / the amount agreed in writing between the Merchant and the Grower immediately upon delivery of the Produce to the Merchant]
[Note: Delete as appropriate].

6. Payment

6.1. Subject to clause 12, the Merchant will pay the Grower for the purchase of a Grower's delivered Horticulture Produce.

6.2. Payment under subclause 6.1 will be made:

- (a) within [insert number of] days of the Grower delivering the Horticulture Produce to the Merchant
- (b) by [insert form of payment (e.g. by electronic transfer, in cash, etc.)], unless otherwise agreed in writing between the Merchant and the Grower.

7. Services by Merchant

7.1. The Merchant will supply [insert details of the service] to the Grower.

- 7.2. The fee that the Grower will pay for the service specified in subclause 7.1 and provided by the Merchant is **[insert the fee or method for calculating the fee]**.
- 7.3. The amount to be paid by the Grower for the services provided by the Merchant shall be determined by the parties immediately upon the service being completed.
- 7.4. The Grower will pay the amount determined by the parties under subclause 7.3 within **[insert number of days]** of the Merchant providing the service

8. Delivery of Horticulture Produce

[Note: you must specify any specific requirements that you have relating to delivery of Horticulture Produce. The following subclauses are an example of some delivery requirements that you might want to include. They should be adapted to suit your own circumstances and may reflect your usual delivery requirements.]

- 8.1. For the purposes of this agreement, delivery of Horticulture Produce occurs when the Horticulture Produce arrives at the address specified in accordance with subclause 8.5.

[Note: Where delivery is to occur at a different point in time, this must be specified. For example, if Horticulture Produce is stored by the Merchant while it ripens (as a service supplied to the Grower) then delivery will not be when the Horticulture Produce arrives, but at a later point.]

- 8.2. The Grower will bear the costs of delivery of the Horticulture Produce to the Merchant, unless agreed otherwise by the parties in writing. **[Note: amend if Grower is not to bear the costs or if the Produce is to be collected by the Merchant.]**
- 8.3. The Grower may deliver Horticulture Produce to the Merchant in the following circumstances:

(a) **[Insert any specific requirements relating to delivery of Horticulture Produce—e.g. whether delivery is upon request, etc.]**

- 8.4. A Grower will comply with the following requirements when delivering Horticulture Produce to the Merchant:

(a) the Grower will include with each delivery, documentation listing the quantity and type of all Horticulture Produce in the delivery

(b) **[Insert any other specific requirements relating to delivery—e.g. timing.]**

- 8.5. Where the Grower delivers Horticulture Produce to the Merchant, the Grower is to deliver the Horticulture Produce to **[insert address or location]** or as otherwise instructed in writing by the Merchant from time to time. **[Note: Amend to include any other requirements]**

- 8.6. The Merchant will provide secure and suitable off-loading facilities at the premises referred to in subclause 8.5 so as to facilitate the safe and timely off-loading of the Horticulture Produce. **[Note: delete if not applicable]**

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

- 8.8. The Merchant will accept as proof of delivery of Horticulture Produce by the Grower, any document that acknowledges, reflects or evidences delivery:

- (a) where delivery is to an address that is the usual place of business of the Merchant, given to the Grower by it, its officers, employees or agents, or
- (b) where delivery is to an address that is not the usual place of business of the Merchant, given to the Grower by any person who accepts delivery at that address and has the actual or ostensible authority of the Merchant or is a person who is apparently an adult and appears to be engaged in the service of the business at that address.

9. Type of Horticulture Produce

9.1. The Grower will deliver the following types of Horticulture Produce to the Merchant in accordance with the terms of this agreement:

- (a) *[Specify the types of Produce that will be delivered]*, or
- (b) as requested in writing by the Merchant from time to time.

10. Quality of Horticulture Produce

10.1. Horticulture Produce delivered by the Grower must meet [Fresh Markets Australia's FreshSpecs Produce Specifications / other specifications] *[delete as appropriate. If including specifications other than the FreshSpecs Produce Specifications then include details of the specifications that apply]* for each type of Horticulture Produce delivered by the Grower.

11. Quantity requirements

11.1. Horticulture Produce delivered by the Grower must meet the following quantity requirements:

- (a) *[Insert any specific quantity requirements that you have in relation to Horticulture Produce.]*

12. Rejection of Horticulture Produce

12.1. The Merchant will accept and be deemed to have accepted delivery of all Horticulture Produce delivered in accordance with this agreement, unless the circumstances set out in this clause apply.

12.2. The Merchant may reject Horticulture Produce delivered by the Grower in the following circumstances:

- (a) if the Horticulture Produce delivered does not satisfy the type, quality or quantity requirements specified in clauses 9 to 11, above. However, if part of the delivered Horticulture Produce does not satisfy the requirements in clauses 9 to 11 and part of the delivered Horticulture Produce does satisfy those requirements, the Merchant may only reject the part of the Horticulture Produce that does not meet those requirements **[Note: delete if not applicable.]**
- (b) if the Grower does not have title in the Horticulture Produce delivered by it
- (c) *[Insert any other specific circumstances (if any) in which a Merchant may reject a Grower's Produce.]* **[Note: Horticulture Produce can only be rejected in these circumstances].**

- 12.3. The Merchant may only reject Horticulture Produce under subclause 12.2 within [specify time period. e.g. 24 hours] of delivery of the Produce in accordance with this agreement.
- 12.4. Where the Merchant rejects Horticulture Produce under this clause, the Merchant will within 24 hours after the time at which the Produce is rejected, notify the Grower of the rejection by telephone, fax, email or other electronic means. Where a Merchant fails to comply with this obligation, the Merchant will be deemed to have accepted delivery of the Horticulture Produce.
- 12.5. The Merchant will notify the Grower in writing of the rejection and the reasons for the rejection within [insert time period] of taking delivery of the Produce.
- 12.6. Where Horticulture Produce is rejected by the Merchant, the Merchant may [return the Produce to the Grower at the Grower's expense / hold the Produce at [insert premises] for collection by the Grower at an agreed time / or where the Produce is rejected for failure to meet the quantity specifications set out in subclause 11.1, pool the Produce in accordance with clause 13. [Note: select the appropriate option/s]

13. Pooling of produce

- 13.1. The Merchant may pool Horticulture Produce delivered by the Grower under this agreement with other produce if:
- (a) the other produce is of the same quality as the Horticulture Produce delivered by the Grower, and
 - (b) the Grower's Horticulture Produce and the other produce meet the quality requirements, specified in subclause 10.1 of this agreement.
- 13.2. Where the Merchant pools Horticulture Produce in accordance with this clause, the amount payable to the Grower will be a proportion of the total proceeds received by the Merchant for the pooled Horticulture Produce that is equal to the proportion of the pooled Horticulture Produce that was contributed by the Grower.

14. Title

- 14.1. The Grower warrants that it has title in the Horticulture Produce that it delivers to the Merchant.
- 14.2. Title in Horticulture Produce supplied by the Grower in accordance with this agreement will pass to the Merchant:
- (a) where the price of the Horticulture Produce, or a method or formula to calculate the price has been agreed to by the Merchant and Grower before delivery as specified in subclause 5.1 of this agreement - on delivery of the Horticulture Produce to the Merchant
 - (b) where subclause 14.2(a) does not apply and the Merchant is to provide a service in relation to the Horticulture Produce in accordance with clause 7 - at the time the service is completed
 - (c) where the circumstances in subclauses 14.2(a) and (b) do not apply, at the time that the parties agree on a price for the Horticulture Produce.

15. Insurance

- 15.1. [Note: if the Merchant does not have insurance, include the following clause.]

The Merchant does not hold any insurance policies in relation to Horticulture Produce under the Merchant's control covered by this agreement.

OR

[Note: if the Merchant has insurance, provide details about the insurance policy]

The Merchant has insurance for Horticulture Produce under the Merchant's control.

15.2. The details of the 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 policy in respect of claims that may be made in relation to the Horticulture Produce is **[insert amount]**
- (c) the policy covers **[delete whichever do not apply]** fire, theft and accidental damage (other than deterioration of quality or any other inherent losses).

16. Dispute resolution

16.1. In the event that there is a dispute with the Merchant under this agreement or the Code, the Grower should contact the person specified below:

Merchant contact

Name:	
Phone:	
Email:	

16.2. In the event that there is a dispute with the Grower under this agreement or the Code, the Merchant should contact the person specified below:

Grower contact

Name:	
Phone:	
Email:	

16.3. The parties agree that if a dispute arises between them in relation to any matter covered by this agreement, they will follow the dispute resolution procedure set out in Part 5 of the Code.

17. Termination

17.1. Subject to subclause 17.2, this agreement can be terminated by either party giving four (4) weeks' written notice of termination to the other party. **[Note: parties can choose their own termination process, but the agreement must specify a process for termination]**

17.2. 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:

- (a) 14 days after the day on which this agreement was entered into, or
- (b) such shorter or longer period as is agreed by the parties, provided the initial cooling-off period is not reduced by more than 7 days.

17.3. Where this agreement is terminated pursuant to subclauses 17.1, 17.2(a) or 17.2(b), any trade that has occurred under the agreement before the termination is governed by the terms of this agreement.

17.4. Subject to subclause 17.5, 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.

17.5. A party required to return a payment under subclause 17.4 may deduct, from the amount to be returned, reasonable expenses incurred under the agreement for the purposes of, and directly related to, trade that would have occurred after the termination of the agreement.

[Note: clauses 17.2 to 17.5 set out the cooling-off rights and obligations provided for in the Horticulture Code]

18. Variation

18.1. This agreement may only be varied by

further agreement in writing between the Merchant and the Grower and be accepted by the parties to it either by signature by both parties or a written notice of offer and a written notice of acceptance. **[Note:** the parties can choose their own process for varying an agreement, but the agreement must specify that process]

[Note: *An example of a notice of offer or acceptance is a confirmation of the offer or acceptance by email.*]

[Note: a Merchant's terms of trade may also include other relevant terms on which the Merchant is prepared to trade in Horticulture Produce and that the Merchant wishes to include in this agreement, provided the additional terms are not inconsistent with any of the provisions of the Code.]

Agreement Signing Page

The parties agree that by signing this agreement, they enter into an agreement comprising:

- (a) the terms and conditions set out in clauses 1 to 19 above
- (b) Annexure 1 – Definitions and Interpretation

Executed by or on behalf of [Print Merchant's name and ACN/ABN]

)	
)	
.....)
Signature of director)	Signature of director/company secretary (delete as appropriate, or entire column if sole director company)
.....)
Name of director (print))	Name of director/company secretary (print)
Date)	Date

Executed by or on behalf of [Print Grower's name and, if relevant, ACN/ABN]

.....

[If Grower is an individual]

.....

Signature of Grower

Date

[If Grower is a company]

)	
)	
.....)
Signature of director)	Signature of director/company secretary (delete as appropriate, or entire column if sole director company)
.....)
Name of director (print))	Name of director/company secretary (print)
Date)	Date

Annexure 1 – Definitions and interpretation

1. Definitions [Note: *delete and include additional definitions as required*]

In this agreement–

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 a person who grows Horticulture Produce for sale and for the purposes of this agreement is the person specified on page 1 of the agreement.

Horticulture Produce means unprocessed fruit, unprocessed vegetables (including mushrooms and other edible fungi), unprocessed nuts, unprocessed herbs, other unprocessed edible plants, but does not include Nursery Products.

Merchant means a person who purchases Horticulture Produce from a Grower for the purpose of resale of that Horticulture Produce, but does not include:

- (a) a person who purchases the Produce for export by that person, or
- (b) a person who purchases the Produce for retail sale by that person

and for the purposes of this agreement is the person specified on page 1 of the agreement.

Nursery Products include: trees, shrubs, plants, seeds, bulbs, corns and tubers (other than edible tubers); propagating material and plant tissue cultures, grown for ornamental purposes or for producing fruits, vegetables, nuts or cut flowers or foliage; and cut flowers or foliage.

Reporting Period means the period specified in subclause 3.1.

Start Date means the period specified in subclause 2.1.

Statement Period means the period specified in subclause 3.3.

Term means the period specified in subclause 2.1.

Merchant means a Merchant and for the purposes of this agreement is the person specified on page 1 of the agreement.

2. Interpretation

In this agreement, unless the contrary intention appears:

- (a) words in the singular include the plural and words in the plural include the singular
- (b) the word ‘includes’ in any form is not a word of limitation
- (c) a reference to ‘\$’ or dollars is a reference to Australian dollars
- (d) a reference to any legislation or legislative provision includes a statutory modification, substitution or re-enactment of that legislation or legislative provision
- (e) if any word or phrase is given a defined meaning, any part of speech or other grammatical form of that word or phrase has a corresponding meaning.