

Terms and Conditions of Trade with Buyers

Unearthed Produce Limited

INTRODUCTION

Unearthed Produce Limited (“**Unearthed**”) is a significant fresh produce player in the New Zealand market. In the course of its business it:

- sells to buyers (“**Buyers**”) vegetables (“**Produce**”) on consignment on behalf of the growers of the Produce (“**Growers**”);
- purchases Produce from Growers (as principal) and then sells such Produce to Buyers;
- delivers or arranges delivery of Produce from Unearthed’s premises to the Buyer’s premises;
- procures the delivery of Produce directly from a Grower to a Buyer.

(the above, individually and jointly being referred to as “**Sales and/or Services**”).

This document (together with any other documents or policies referred to herein) sets out terms and conditions (“**Terms and Conditions**”) that will apply where Unearthed provides the Buyer with Produce or any Sales and/or Services.

These Terms and Conditions will come into full effect and operation on 31st March 2022 and will replace all existing terms and conditions between Unearthed and each Buyer.

1.0 **ACCEPTANCE OF TERMS AND CONDITIONS**

1.1 Unearthed will not be obliged to provide Produce or any Sales and/or Services to a Buyer unless that Buyer has completed, executed and delivered to Unearthed the required forms to activate a purchase account through which the Buyer can purchase Produce from Unearthed (“**Buyer Application Forms**”).

1.2 Unearthed may, in its sole discretion, accept or reject:

- (a) any application made by a Buyer to become an account holder; or
- (b) any offer by a Buyer to purchase Produce.

1.3 The Buyer acknowledges and agrees that the:

- (a) acceptance of any Produce by the Buyer from Unearthed; or
- (b) completion and execution of any Buyer Application Forms by the Buyer,

will be deemed to be an acceptance of these Terms and Conditions by the Buyer (whether or not the Buyer has completed a Buyer Application Forms) from the earlier of time when such acceptance or execution took place.

1.4 Unearthed may sell Produce to the Buyer as agent for Growers or on its own account.

1.5 Unearthed may alter these Terms and Conditions by giving notice of those alteration(s) to the Buyer and the subsequent dealing by the Buyer with Unearthed will be deemed to be acceptance of the alteration(s) to these Terms and Conditions.

2.0 PURCHASE AND COLLECTION OF PRODUCE

2.1 No Produce shall be removed from Unearthed’s premises without the required documentation of the sale having been signed by Unearthed. The Buyer authorises Unearthed to inspect any vehicle at Unearthed’s premises for the purpose of verifying that the Produce in the vehicle reflects the documentation relating to the purchases made by the Buyer.

2.2 Unless Unearthed expressly agrees otherwise, the Buyer will be responsible for removing all Produce purchased from Unearthed’s premises on the day of sale.

2.3 If a Buyer leaves or does not collect Produce from Unearthed’s premises (either with or without Unearthed’s agreement) Unearthed shall not have any responsibility or liability to the Buyer for any damage to or loss of the Produce. In such circumstances, risk in the Produce shall be deemed to have transferred to the Buyer at the point at which the Buyer or its agent took or should have taken possession of the Produce.

3.0 PAYMENT TERMS

3.1 The following payment terms are in addition to those set out in the Buyer Application Forms.

3.2 In respect to any sale of Produce or provision of any Sales and/or services, the relevant price, associated fees, levies and charges will be as specified by Unearthed to the Buyer. Unless expressly stated otherwise, all prices, fees and charges are exclusive of Goods and Services Tax pursuant to the Goods and Service Tax Act 1985 (“**GST**”). Unearthed will invoice the Buyer for Produce supplied and the Buyer shall not issue a Buyer created tax invoice to Unearthed.

3.3 In the absence of any credit terms agreed in writing, Produce must be paid for within seven (7) days of the date of purchase. If Unearthed has concerns regarding the solvency of the Buyer, Unearthed may place the Buyer on “cash terms”.

3.4 Unearthed shall be entitled to apply any monies received from the Buyer to outstanding interest charges and/or accounts, in such order as Unearthed sees fit. The Buyer agrees to indemnify Unearthed against all costs, losses and expenses (including legal and debt collection costs and expenses) relating to the attempted and actual recovery of monies owing by the Buyer to Unearthed.

4.0 TITLE AND RISK

4.1 Risk in the Produce shall pass to the Buyer at the time the Produce is:

- (a) delivered to the Buyer, if Unearthed is arranging delivery; or
- (b) collected or ought to have been collected by the Buyer or its agent,

irrespective of whether the Produce was left at Unearthed’s premises after possession of the Produce was taken or should have been taken by the Buyer or its agent.

4.2 Title and ownership in and to the Produce shall not pass upon delivery, but shall remain with Unearthed or the relevant Grower (as appropriate) until payment of all monies owing in respect of the Produce have been made. Until the Produce is paid for in full:

- (a) the relationship between Unearthed (in its own capacity or as agent for the Grower) and the Buyer shall be a fiduciary relationship and the Buyer may only sell, deal or process the Produce in a fiduciary capacity;
- (b) the Buyer must store the Produce separately in a manner consistent with the Produce being the property of Unearthed (in its own capacity or as agent for the Grower) and must ensure such Produce is able to be separately identified;
- (c) on any sale or other realisation of the Produce, the Buyer shall identify and separately account to Unearthed (in its own capacity or as agent for the Grower) for the proceeds of sale and Unearthed shall be entitled to trace such proceeds of sale; and
- (d) Unearthed shall have the irrevocable right of entry to inspect and/or remove Produce from any premises in which Produce is situated.

4.3 Without limiting any other provision within these Terms and Conditions, the Buyer:

- (a) agrees that these Terms and Conditions create, in favour of Unearthed, a security interest in all present and after acquired Produce sold by Unearthed (whether in its own capacity or as agent for the Grower) to the Buyer and all proceeds from that Produce; and
- (b) grants Unearthed a security interest in all present and after acquired Produce supplied by Unearthed (whether in its own capacity or as agent for the Grower) to the Buyer for the benefit of itself and as agent for any relevant Grower and all proceeds from any sale of that Produce, in each case, to secure payment of all monies owing in respect of the Produce supplied.

5.0 CLAIMS

5.1 Subject to clause 5.2, any claim to be made by a Buyer in relation to the quality, quantity or type of any Produce or performance of any Sales and Services purchased or the amount charged for such Produce or Sales and/or Services must be made in writing within 24 hours of purchasing the Produce or receiving the Sales and/or Services. The Buyer shall not be entitled to make a claim against Unearthed or the Grower in relation to any Produce or any sales and/or Services if that claim is not lodged in writing within that time period.

5.2 Where Unearthed arranges for the delivery of the Produce to the Buyer, without the Buyer or its agent having inspected the Produce, the Buyer must lodge any claim in relation to the quality or quantity of the Produce within 24 hours of delivery.

5.3 Any claims lodged within the required timeframe will be investigated by Unearthed in good faith. If Unearthed determines that a claim is valid, it shall either:

- (a) take back the Produce supplied and replace it with Produce of the same type, grade and quality;
- (b) take back the Produce supplied and give the Buyer a credit for the price paid for that Produce;
- (c) re-supply the relevant part of the Sales and/or Services;
- (d) give the Buyer a credit for an amount up to the price paid by the Buyer for that Produce or Sales and/or Services.

5.4 The choice of alternatives, in clause 5.3, is at the sole discretion of Uearthed and will apply to both Produce owned by Uearthed as well as Produce being sold on consignment. The liability of Uearthed and the relevant Grower shall at all times be limited to providing the credit or replacing the Produce, as set out in clause 5.3.

6.0 **Warranties and Limitation of Liability**

6.1 Uearthed generally sells as an agent and intermediary to affect the sale on consignment of Grower's Produce to the Buyer. Uearthed will not be liable to the Buyer as principal for any failure to supply, any delay in supply, failure to supply the correct quality or quantity or otherwise.

6.2 Where a Buyer or its agent purchases Produce from Uearthed's premises or direct from the Grower the Buyer acknowledges that it or its agent will have normally first inspected the Produce and, in any event, will have determined to purchase it solely relying on their own skill and experience and will not have relied on any actual or alleged representations or warranties made by Uearthed or any of its staff, contractors or agents and that the Buyer shall have no claim against Uearthed and/or the Grower in relation to the quality of the Produce.

6.3 These Terms and Conditions have been prepared on the basis that the supply of Produce and any Sales and/or Services 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 any Sales and/or 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 determined to be for domestic purposes the:
 - (i) CG Act shall apply and shall expressly over-ride any of these Terms and Conditions inconsistent with it; and
 - (ii) Buyer shall be deemed to have contract out of the CG Act and the Buyer shall indemnify Uearthed, and keep Uearthed indemnified in respect of any failure to comply with this provision.

6.4 Without limiting the generality of clauses 5 and 6, while Uearthed will use all reasonable endeavours to maintain and operate its premises in a manner that complies with all relevant food safety standards, given the nature of Produce and the physical interaction of Growers and Buyers with it, Uearthed shall have no liability to the Buyer or any person claiming through them in relation to any Produce not meeting any food safety standard or requirement.

6.5 In the event that Uearthed or a Grower has any liability to a Buyer in relation to any Produce or any Sales and/or Services provided in connection with these Terms and Conditions or otherwise, the total liability of Uearthed and/or a Grower shall be limited (at Uearthed's option) to the options set out in clause 5.3.

6.6 Without in any way limiting the generality of this clause and clause 5, in no event shall Uearthed or any Grower be liable for any indirect, incidental, special, consequential damages (including, without limitation, loss of profits or revenues even if it has been advised of the possibility of such damages) suffered or incurred by the Buyer arising out of or in connection with the ordering, sale, delivery or performance of any Produce or any Sales and/or Services.

7.0 HEALTH & SAFETY AND USE OF FORK HOISTS OR OTHER EQUIPMENT

- 7.1 Where the Buyer or any of its employees, contractors or agents are on Unearthed's premises, the Buyer will ensure that they all:
- (a) complete a health and safety induction in respect of working on the premises;
 - (b) comply with all applicable health and safety policies relating to the premises and any related directions by a Unearthed representative; and
 - (c) work and operate in a safe manner and promptly report all hazards, accidents and incidents they become aware of.
- 7.2 Where the Buyer or the Buyer's agent has express written authority from Unearthed to use a fork hoist mobile container moving device or other equipment owned by or in the care of a Unearthed Business ("**Equipment**"), such authority will be conditional on the Buyer only allowing qualified and certified operators to operate such Equipment.
- 7.3 The Buyer will indemnify Unearthed and keep and hold them harmless against all claims made against them and all losses, damages, costs (including legal costs calculated on a solicitor and client basis) and expenses that they may suffer or incur as a result of the Buyer's or Buyer's agents use of the Equipment, together with all costs incurred by Unearthed (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 Unearthed's failure to properly maintain the Equipment in question.
- 7.4 The Buyer will indemnify Unearthed for any loss, claim, or cost or damage to, or loss of Produce that arises as a result of the Buyers or the Buyers' agents moving Produce with the Equipment or of any Unearthed staff moving Produce with Equipment on the Buyer's behalf, in instances where the load of Produce is subsequently determined by Unearthed to have been unsafely or incorrectly packed by the Buyer or its employee, contractor or agent.
- 7.5 If the Buyer or any Buyer's employee, contractor or agent causes:
- (a) damage to any vehicles or assets owned by third parties that are on Unearthed's site;
 - (b) damage to any Unearthed property, plant or buildings; or
 - (c) injury to any Unearthed employee, contractor or any visitor on Unearthed's site,

while using the Equipment, then the Buyer will indemnify Unearthed against all resultant claims against Unearthed and all losses (including consequential losses), damage, costs, expenses or penalties suffered by Unearthed, together with all costs incurred by Unearthed (including legal costs calculated on a solicitor and client basis) in dealing with any such claim or actions taken by Unearthed with respect to such loss or damage.

8.0 Confidentiality

- 8.1 The Buyer shall treat all information relating to the prices for Produce and Sales and/or Services provided by Unearthed as confidential between the Buyer and Unearthed and the Buyer shall not disclose any such information to any third party without the prior written consent of Unearthed.

9.0 Intellectual Property

- 9.1 The Buyer acknowledges and agrees that the use by the Buyer of any trade mark, brand, logo or other intellectual property right which Unearthed or any entity related to or associated with Unearthed owns or has the right to use, including any trade mark, brand, logo (including any intellectual property right of a Grower relating to Produce sold by Unearthed) (“**Unearthed IP**”) in relation to the Produce purchased by the Buyer does not give the Buyer any ownership right in the Unearthed IP or the right to use the T&G IP for any purpose other than the purpose that the right to use the Unearthed IP has been granted.
- 9.2 The Buyer must obtain the prior written consent of Unearthed before using any Unearthed IP in any manner that is different from the manner in which it is provided to the Buyer by Unearthed.

10.0 FORCE MAJEURE

- 10.1 Unearthed shall not be liable for any delay or failure to perform its obligations under these Terms and Conditions by reason of any circumstances or events beyond the reasonable control of Unearthed including without limitation any acts of God, or the public enemy, flood, earthquake, storm, cyclone, tornado, hurricane, lightning, fire, explosion, epidemic, pandemic, war, embargos, riot or civil disturbance, lock out, strikes or other labour disputes or industrial actions (“**Force Majeure**”). Any suspension of performance by reason of this clause will be limited to the period during which the Force Majeure exists.
- 10.2 Unearthed may terminate the performance of its obligations in respect of the particular dispatch or order of Produce or provision of any Sales and/or Services to which the Force Majeure relates immediately by giving notice to the Buyer if the delay arising directly out of Force Majeure precluding Unearthed from complying with its obligations continues for more than seven (7) consecutive days.

11.0 ALTERNATIVE DISPUTE RESOLUTION

- 11.1 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.
- 11.2 In the event the dispute is not resolved by such agreement within fourteen (14) 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 fifteen (15) 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 organization. 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 conducted in accordance with the Arbitration Act 1996, unless the parties agree otherwise.
- 11.3 Notwithstanding anything in this clause or the Arbitration Act 1996, either party may commence court proceedings in relation to any dispute for which that party seeks urgent interlocutory relief.

12.0 GENERAL CONDITIONS

- 12.1 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).
- 12.2 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.
- 12.3 If Uearthed is owed any money by the Buyer, has incurred any cost or expense on behalf of a Buyer, has any claim against the Buyer or is exposed to any contingent liability arising out of a breach by the Buyer of the Terms and Conditions ("**Liability**") and such Liability remains outstanding for more than ten (10) days from when it fell due or was incurred, then the Buyer authorises Uearthed to set off such Liability(together with any applicable GST) from any sum that may be owed to the Buyer by Uearthed. The Buyer shall not be entitled to set off any amounts which it claims are owing by Uearthed or any Grower to the Buyer and all payments shall be made by the Buyer free from all deductions, rights of set off or any other equitable claim by the Buyer.
- 12.4 Where Uearthed 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 enforce these Terms and Conditions as if it were a party to these Terms of Trade by virtue of Subpart 1 (Contractual Privity) of Part 2 of the Contract and Commercial Law Act 2017.
- 12.5 The Buyer shall not be entitled to transfer or assign any rights under these Terms and Conditions to any person without the prior written consent of Uearthed. A change in the effective management or control of the Buyer or its amalgamation with any other company shall be deemed to be an assignment requiring the prior written consent of Uearthed.
- 12.6 Where Uearthed fails to enforce any of these Terms and Conditions or fails in any way to exercise its rights under them, Uearthed will not be deemed to have waived those rights with respect to any subsequent breach of any Term or Condition or right.
- 12.7 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.
- 12.8 In these Terms and Conditions the singular will include the plural and a reference to a "party" or the "parties" will mean either each of Uearthed or the Buyer or Uearthed and the Buyer together.