

## Driscoll's Australia Partnership – Terms of Trade

Updated 1 April, 2018

These Terms of Trade are the preferred terms of trade for the Driscoll's Australia Partnership (**Driscoll's Australia**) – a partnership established by Costa Berry Holdings Pty Ltd and Berry Holdings of Australia Pty Ltd – when acting as Agent in the trade of horticultural produce.

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### 1. Application

- 1.1 The Driscoll's Australia Terms of Trade (the **Terms**) comprise the terms and conditions on which Driscoll's Australia is prepared to deal or trade in Fruit as agent for the Grower.
- 1.2 Driscoll's Australia will deal or trade in Fruit with Growers that have entered into a Horticultural Produce Agreement (**HPA**) as required by the Code.
- 1.3 To the extent that the Terms are inconsistent with a HPA entered into by the Grower and Driscoll's Australia, the terms of the HPA prevail.

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### 2. Driscoll's Australia rights and responsibilities

- 2.1 Driscoll's Australia is responsible for marketing and selling the Fruit as agent for the Grower in accordance with the Code, the Terms and a HPA entered into by the Grower and Driscoll's Australia.
- 2.2 Subject to clause 2.3, Driscoll's Australia may sell and distribute the Fruit for such prices and on such terms and conditions as Driscoll's Australia may deem appropriate.
- 2.3 Driscoll's Australia has full discretion to determine:
  - 2.3.1 the times when, the places and markets where and the customers to whom, the Fruit will be sold;
  - 2.3.2 the preparation of processing necessary for the Fruit;
  - 2.3.3 the prices for which the Fruit is to be sold;
  - 2.3.4 the manner of distribution; and
  - 2.3.5 any other terms of sale,provided that Driscoll's Australia must seek at all times to obtain reasonable prices and terms for sale of Fruit and deal on arm's length terms.
- 2.4 For the avoidance of doubt, nothing in this clause prevents Driscoll's Australia from selling Fruit through discount or other similar programs with supermarkets or other customers.

- 2.5 Driscoll's Australia will coordinate and arrange for the freight and delivery of the Fruit, the costs of which are to be borne by the Grower in accordance with clause 3.3. The Grower will need to co-ordinate the delivery of fruit to the nominated Driscoll's warehouse for further distribution to customers.
- 2.6 Driscoll's Australia will pursue customers for payment of Bad Debts, but is not obliged to commence legal proceedings against customers in respect of Bad Debts.
- 2.7 At the Grower's request, Driscoll's Australia will provide to the Grower details of Bad Debts that relate to that Grower, including the relevant customer's identity and contact details.

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**3. Grower rights and responsibilities**

- 3.1 The Grower must deliver all Fruit to Driscoll's Australia or to a third party as Driscoll's Australia directs.
- 3.2 The Grower must not otherwise sell, dispose of, distribute, export, transport or assign the Fruit to any person.
- 3.3 The Grower is responsible for all costs in connection with:
- 3.3.1 freight and transportation of the Fruit; and
  - 3.3.2 packaging, handling and storage of the Fruit prior to its delivery,
- and will pay such costs to Driscoll's Australia or to the relevant third party in accordance with Driscoll's Australia's directions.
- 3.4 The Grower enters into this agreement for the purposes of the Permitted Purpose only, and is not permitted to use the Fruit, the Plant Material or any associated material for any breeding, pollination, selection or other genetic manipulation purposes without the prior written consent of Driscoll's Australia.
- 3.5 The Grower must not make publicly available any of the results from the Permitted Purpose without the prior written consent of Driscoll's Australia, unless permitted under a HPA entered into by the Grower and Driscoll's Australia.

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**4. Parties to co-operate**

- 4.1 The Grower and Driscoll's Australia will cooperate with each other regarding the production of the Fruit and may confer (in person or by telephone) from time to time during each calendar month to review information regarding the production of the Fruit and such other matters as requested by the Grower or by Driscoll's Australia. Upon Driscoll's Australia's request, the Grower and Driscoll's Australia will meet at the end of the season and review all aspects of the production of the Fruit.

**5. Payment and entitlements**

- 5.1 The Grower and Driscoll's Australia will each be entitled to a fixed percentage of the proceeds of the sale of the Fruit by Driscoll's Australia as agreed and adjusted in a HPA entered into by the Grower and Driscoll's Australia (such an amount being the **Entitlement** of that party).
- 5.2 Driscoll's Australia is responsible for the payment of any existing settlement discount as at the date of this agreement extended to customers in relation to the Fruit.
- 5.3 The Grower is responsible for the payment of any credit invoices for Fruit that is returned or rejected in accordance with clause 7.
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**6. Records and reporting statements**

- 6.1 The Grower must keep all usual and proper records and books of account consistent with the Code and best commercial practices relating to its production of Fruit.
- 6.2 Driscoll's Australia must keep all usual and proper records and books of account consistent with the Code and best commercial practices relating to its receipt of Fruit.
- 6.3 Driscoll's Australia will provide a statement (**Reporting Statement**) to the Grower which will set out the following for each Reporting Period:
- 6.3.1 the dates on which Fruit was delivered to Driscoll's Australia;
  - 6.3.2 the dates of the sale of the Fruit by Driscoll's Australia;
  - 6.3.3 the type and quantity of the Fruit sold;
  - 6.3.4 details of each amount deducted by Driscoll's Australia from the sale price of the Fruit; and
  - 6.3.5 details of any amounts of the Fruit not sold by Driscoll's Australia during the relevant Reporting Period including the reasons why the Fruit was not sold, details of any amounts of Fruit destroyed by Driscoll's Australia, and details of any amounts of the produce held by Driscoll's Australia at the end of the relevant Reporting Period.
- 6.4 Driscoll's Australia will provide the Reporting Statement no later than the first Friday that is at least twenty one (21) days following the date that the Grower delivered Fruit to Driscoll's Australia. If there is no relevant activity during the Reporting Period, no Reporting Statement will be issued,
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**7. Quality standards**

- 7.1 Driscoll's Australia has the sole and absolute right and discretion to set quality control grades and standards (**Quality Standards**) which the Fruit must meet in order for the Grower to be entitled to the Grower's Entitlement in respect of that Fruit.
- 7.2 Driscoll's Australia's quality control inspection of the Fruit against the Quality Standards is conclusive as to grade, condition and quality.

- 7.3 Driscoll's Australia has the full discretion to accept or reject any Fruit in accordance with the Quality Standards.
- 7.4 Driscoll's Australia will notify the Grower in writing if any Fruit is rejected within 1 Business Day after delivery. Reasons for any rejection will be notified in writing within a further 1 Business Day of notifying the Grower.
- 7.5 If any Fruit is rejected, the Grower will, at its sole expense, take such reasonable action as Driscoll's Australia reasonably directs.

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**8. Additional covenants**

**8.1 Governmental approvals and compliance**

The Grower must comply with all applicable local, state and national laws, rules and regulations, which relate to planting, growing, harvesting, processing, cooling, delivery, packing, shipping, storing and transporting the Fruit and in the use and application of pesticides, chemicals and fertilizers in respect of the Fruit.

**8.2 Permits**

- 8.2.1 The Grower shall obtain and maintain, at its sole expense, any applicable governmental approvals, registrations, notifications or the like with regard to this agreement and the Grower's obligations under this agreement.
- 8.2.2 The Grower shall comply with all applicable state and national laws which relate to the employment or contracting of workers and workplace health and safety.

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**9. Grower warranties**

- 9.1 The Grower makes the following representations and warranties to Driscoll's Australia:
- 9.1.1 the Grower will not cause or contribute to, and will use all reasonable efforts to prevent, any adverse effect on the health and or quality of the Fruit through the use of pesticides, fertilisers or other materials;
- 9.1.2 the Grower will at all times comply with accepted horticultural best practices relating to the growing, harvesting or transport of the Fruit;
- 9.1.3 the Grower is authorised to enter into this agreement and performance of the terms of this agreement and of Grower's obligations under it will not breach any separate agreement by which the Grower is bound; and
- 9.1.4 the Grower has the rights, appropriate licenses, government permissions, insurances, and any legal permissions required to enter, unencumbered, into and perform under this agreement.

**10. General**

**10.1 No relationship**

10.1.1 Neither the Grower nor Driscoll's Australia has the power to obligate or bind the other.

10.1.2 The Grower is at all times an independent contractor, and nothing in the Terms or a HPA entered into by the Grower and Driscoll's Australia will be construed or deemed to constitute a partnership, joint venture or employee, employer or representative relationship between the Grower and Driscoll's Australia.

10.1.3 Except as expressly provided, nothing in the Terms or a HPA entered into by the Grower and Driscoll's Australia will be deemed to authorise or empower the Grower or Driscoll's Australia to act as agent at law for or with the other.

**10.2 GST**

10.2.1 All dollar amounts expressed in or pursuant to the Terms or a HPA entered into by the Grower and Driscoll's Australia are exclusive of GST.

10.2.2 The Grower is responsible for payment of all GST arising from any supply made by Driscoll's Australia under the Terms or a HPA entered into by the Grower and Driscoll's Australia.

**10.3 Governing law and jurisdiction**

The Terms are governed by and are to be construed in accordance with the laws of Victoria. The Grower and Driscoll's Australia submit to the non-exclusive jurisdiction of Victoria.

**10.4 Persons**

In the Terms, a reference to a person includes:

10.4.1 a firm, partnership, joint venture, association, corporation or other corporate body; and

10.4.2 the legal personal representatives, successors and permitted assigns of that person.

**10.5 Legislation**

In the Terms, a reference to a statute includes regulations under it and consolidations, amendments, re-enactments or replacements of any of them.

**10.6 Interpretation**

In the Terms:

10.6.1 headings and sub-headings are inserted for ease of reference only and do not affect the interpretation of the Terms;

10.6.2 any right expressed to be exercisable at the discretion of a party is exercisable by that party as a sole and absolute right and in that party's full and complete discretion;

10.6.3 where an expression is defined, another part of speech or grammatical form of that expression has a corresponding meaning; and

10.6.4 where the expression including or includes is used it means 'including but not limited to' or 'including without limitation'.

**10.7 Severance**

10.7.1 If a provision in the Terms is held to be illegal, invalid, void, voidable or unenforceable, that provision must be read down to the extent necessary to ensure that it is not illegal, invalid, void, voidable or unenforceable.

10.7.2 If it is not possible to read down a provision as required in clause 10.7.1, that provision is severable without affecting the validity or enforceability of the remaining part of that provision or the other provisions in the Terms.

**10.8 Currency**

In the Terms and a HPA entered into by the Grower and Driscoll's Australia, a reference to '\$' or 'dollars' is a reference to Australian dollars.

**10.9 Business Day**

If a payment or other act is required by the Terms to be made or done on a day which is not a Business Day, the payment or act must be made or done on the next following Business Day.

**10.10 Number and gender**

Under the Terms, a reference to:

10.10.1 the singular includes the plural and vice versa; and

10.10.2 a gender includes the other genders.

**11. Definitions**

In the Terms, unless expressed or implied to the contrary:

**Bad Debt** has the meaning give in section 6 of the Code.

**Business Day** means Monday to Friday excluding public holidays in Victoria.

**Code** means the Code of Conduct of that name made under the Competition and Consumer (Industry Codes – Horticulture) Regulations 2017.

**Driscoll's Plant Varieties** means the plant varieties provided by Driscoll's Australia (or its representative) to the Grower under the terms of a HPA entered into by the Grower and Driscoll's Australia, or otherwise as agreed between Driscoll's Australia and the Grower as being Driscoll's Plant Varieties.

**Entitlement** has the meaning given in clause 5.1.

**Fruit** means fruit harvested or yielded from the Driscoll's Plant Varieties.

**HPA** has the meaning given in clause 1.2.

**Permitted Purpose** means the purpose of producing and harvesting Fruit from the Driscoll's Plant Varieties in accordance with the Terms.

**Plant Material** means the plant and any plant material from the Driscoll's Plant Varieties capable of being propagated, including (as relevant) whole plants and all parts thereof, including runners (if relevant), cell cultures, cuttings, buds, roots, seeds, flowers, pollens, any mutations, sucker growth and offspring, but does not include Fruit.

**Quality Standards** has the meaning given in clause 7.

**Reporting Period** means each calendar week ending close of business Sunday.

**Reporting Statement** has the meaning given in clause 6.3.