
TURNERS AND GROWERS LIMITED

**STANDARD TERMS AND CONDITIONS FOR
THE PROVISION OF TRANSPORTATION AND
DELIVERY SERVICES**

**VERSION 2: EFFECTIVE FROM
17th SEPTEMBER 2008**

RUSSELL McVEAGH

CONTENTS

1. DEFINITIONS 2

2. ACCEPTANCE OF TERMS..... 3

3. T&G OBLIGATIONS 3

4. CUSTOMER OBLIGATIONS..... 3

5. PAYMENT..... 3

6. DAMAGE, DETERIORATION AND RETURNS 5

7. RISK AND TITLE 5

8. LIENS..... 5

9. LIABILITY..... 5

10. INDEMNITY 6

11. SUBCONTRACTING 7

12. CONFIDENTIALITY 7

13. FORCE MAJEURE 7

14. DISPUTE RESOLUTION..... 7

15. GENERAL..... 8

1. DEFINITIONS

1.1 Definitions: In the Terms, unless the context otherwise requires:

"**Act**" means the Carriage of Goods Act 1979.

"**Business Day**" means any day other than a Saturday, Sunday or a statutory public holiday in New Zealand.

"**Consumer Price Index**" means the official New Zealand consumer price index published quarterly by Statistics New Zealand or its successor (or, if that index ceases to be published or otherwise ceases to be available to T&G and the Customer, means such other index as measures, in a manner which most closely resembles the manner in which the consumer price index measures (immediately prior to the index becoming unavailable or ceasing to be published) inflation or deflation in New Zealand).

"**Customer**" means the person who has agreed to pay the Service Charges and other charges in consideration for the provision of the Services in accordance with the Terms.

"**Default Rate**" means, in relation to any amount payable under the Terms, 18% per annum, which may be amended by T&G 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, lightening, fire, explosion, epidemic, war, embargos, riots or civil disturbance, lock outs, strikes or other labour disputes or industrial actions.

"**GST**" means goods and services tax pursuant to the Goods and Services Tax Act 1985.

"**LEADR**" means Lawyers Engaged in Alternative Dispute Resolution.

"**Products**" means the items that the Customer requires T&G to transport and deliver.

"**Related Company**" has the meaning set out in section 2(3) of the Companies Act 1993.

"**Services**" mean the transportation and delivery services.

"**Service Charges**" has the meaning set out in clause 5.1.

"**T&G**" means Turners and Growers Fresh Limited and any person authorised by it to act on its behalf.

"**Terms**" means these terms and conditions as amended by T&G from time to time.

1.2 Interpretation: In the Terms, unless the context otherwise requires:

- (a) the singular shall include the plural, and vice versa; and
- (b) references to "party" or "parties" shall mean either each of T&G or the Customer, or T&G and the Customer together.

2. ACCEPTANCE OF TERMS

- 2.1 **Account Application Form:** T&G shall not be obliged to provide the Services unless the Customer has completed and executed an approved account application form ("**Account Application Form**") and any other related documents and become an authorised account holder. The Customer acknowledges and agrees that the execution of the Account Application Form shall be deemed to be acceptance of the Terms by the Customer from the time when the execution took place.
- 2.2 **Variation of Terms:** T&G may amend these Terms at any time. Notice of any amendment by T&G may be published on T&G's website (www.turnerstransport.co.nz) and such amendments will be deemed to have taken effect and been accepted by the Customer in respect of all Services requested or provided after the publication of the amendment upon T&G's website.

3. T&G OBLIGATIONS

- 3.1 **Services:** In carrying out the Services, T&G shall:
- (a) perform the Services in conformity with all reasonable directions and requirements of the Customer from time to time; and
 - (b) perform the Services efficiently with due care, diligence and skill, and in accordance with good industry practices.
- 3.2 **Compliance with law and policies:** T&G shall:
- (a) comply with all statutes, regulations, rules and by-laws of any competent authority relating to the provision of the Services; and
 - (b) ensure at all times that it holds all authorisations, permits and licences required to perform the Services in accordance with the Terms.

4. CUSTOMER OBLIGATIONS

- 4.1 **Packaging and labelling:** The Customer shall ensure that all Products:
- (a) comply with the requirements of any applicable law relating to the labelling and packaging of the Products;
 - (b) are safely and properly packaged; and
 - (c) are fully described in writing in all documents relating to the transportation of the Products.
- 4.2 **Temperature setting:** The Customer shall advise T&G in writing, no less than two Business Days prior to the pick-up of the Products, any temperature setting required for each load of Products.

5. PAYMENT

- 5.1 **Service Charges:** Unless otherwise expressly agreed by T&G in writing pursuant to clause 5.2, all applicable prices, fees, levies, charges and taxes ("**Service Charges**") shall be in accordance with T&G's then current list of the Service Charges at the time a

contract is entered into by T&G and the Customer for the provision of the Services. T&G's current list is subject to alteration by T&G without notice.

- 5.2 **Quotation:** T&G may, at the Customer's request, give a written quotation for the Services. Where T&G elects to give a written quotation, that quotation:
- (a) is an offer and T&G must receive the Customer's acceptance of it before any contract for the provision of the Services is entered into by T&G and the Customer;
 - (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 Business Days of its date, unless T&G agree to an extension of the offer period;
 - (d) will, if accepted, govern the Service Charges in respect of that contract and any additional fees, levies, charges or taxes will be charged separately.
- 5.3 **Payment:** The Customer shall pay the Service Charges to T&G in consideration for T&G providing the Services. The Service Charges do not include GST, which shall be payable by the Customer subject to receipt of a relevant tax invoice from T&G and at the same time that the Service Charges are payable.
- 5.4 **Invoicing:** T&G shall invoice the Customer weekly with a valid invoice for the Services provided for the previous week. The Customer shall pay the invoice on or by the seventh Business Day after the date of the invoice. The Customer shall not be entitled to withhold payment or make any set-off or deduction from any payment due by the Customer to T&G under the Terms.
- 5.5 **Overdue amount:** Any amount under the Terms which is due but remains unpaid after the expiry of the time for payment shall bear default interest at the Default Rate, plus any GST thereon, compounded weekly on the unpaid amount from the date that the payment is due until (and including) the date payment is received in full by T&G.
- 5.6 **Review:** T&G shall be entitled to review and alter the Service Charges:
- (a) if there is an increase in the cost of fuel by 5% or more from the cost of fuel in effect prior to that increase; and
 - (b) annually having regard to the Consumer Price Index during the previous 12 months.
- 5.7 **Invoice disputes:** The parties shall use their reasonable endeavours to resolve any disputes as to invoices as soon as possible. Following resolution of any such dispute, the Customer shall pay any amounts which the parties agree should be paid within five Business Days together with interest on that sum in accordance with clause 5.4 unless waived by T&G.
- 5.8 **Set off:** T&G may set off any amount it, or a Related Company of it, owes to the Customer against any amount that the Customer owes T&G under the Terms. If set off is for a Related Company of T&G, T&G shall pay the relevant amount set off in respect of the Related Company to that Related Company.
- 5.9 **Indemnity:** The Customer shall indemnify T&G for any costs or expenses (including legal expenses) incurred by T&G arising out of, or in connection with, the recovery or the attempted recovery of any amount due to T&G under the Terms.

6. DAMAGE, DETERIORATION AND RETURNS

6.1 Procedure: T&G shall:

- (a) provide the Customer with details of any damage or deterioration to or loss of any of the Products while such Products are being carried or stored by or are otherwise in the possession of T&G to the extent that this is within the knowledge of T&G; and
- (b) if required by the Customer, promptly return to the Customer any Products that are so damaged or deteriorated, at the Customer's cost.

6.2 **Claims:** The parties shall use their reasonable endeavours to ensure that any claim in relation to damaged or deteriorated products is investigated and resolved within a reasonable time of it being notified to the Customer.

7. RISK AND TITLE

7.1 **Risk:** Risk in all Products shall pass to T&G on accepting the Products for transportation.

7.2 **Title:** The Products title shall at all times remain with the Customer.

8. LIENS

8.1 **Lien:** As from the time when any amount payable to T&G under the Terms ("**Outstanding Amount**") becomes due, T&G shall be entitled to an active and particular lien over the Products.

8.2 **Removal:** If payment in full for the Outstanding Amount has not been tendered to T&G within the time period specified in clause 5.4, T&G shall be entitled to remove the Products to any suitable premises for storage.

8.3 **Sale:** If payment in full for the Outstanding Amount has not been tendered to T&G within one month of the time period specified in clause 5.4, T&G shall be entitled to sell the Products by public auction. From the proceeds of such sale, T&G shall be entitled to deduct:

- (a) the balance of the Outstanding Amount; and
- (b) all expenses reasonably incurred by it in removing and storing the Products pursuant to clause 8.2, and in arranging and conducting the sale of the Products.

Where the amount of the proceeds is less than the Outstanding Amount and all recoverable expenses, the deficiency constitutes a debt due to T&G by the Customer. Where the amount of the proceeds is more than the Outstanding Amount and all recoverable expenses, the surplus shall be paid by T&G to the Customer.

9. LIABILITY

9.1 **Carriage of Goods Act:** T&G shall provide the Services "at limited carrier's risk" for the purposes of the Act, unless the Customer signs a document relating to Services containing a statement in the following terms:

"These goods shall be carried at "owners' risk". This means that Turners and Growers Limited shall pay no compensation if the goods are lost or damaged unless it intentionally loses or damages them."

- 9.2 **T&G liability:** Subject to clauses 9.1, 9.3, 9.4 and 9.5, T&G shall be liable for any loss or damage to the Products occurring while T&G is responsible for the Products under section 9 of the Act, whether or not the loss or damage is caused wholly or partly by T&G.
- 9.3 **Notice of claim:** No action may be brought against T&G for damage to or partial loss of the Products occurring while T&G is responsible for them under the Act unless:
- (a) written notice giving reasonable particulars of the alleged damage or partial loss, as well as the value claimed, is given within 24 hours of delivery of the Products or, in the case of non-delivery, within two Business Days after the date of dispatch; or
 - (b) any court action taken by the Customer in respect of the alleged damage or partial loss is commenced within six months of delivery or, in the case of non-delivery, within six months and four Business Days of the date of dispatch.
- 9.4 **Limitation of liability:** The liability of T&G to the Customer shall be limited in amount in each case to the lesser of:
- (a) the sum of \$1,500 for each unit (as defined by the Act) of Products lost or damaged; or
 - (b) the amount of the loss or damage suffered by the Customer.
- 9.5 **Consequential loss:** T&G shall not be liable for any loss of profits or any consequential, indirect or special loss, damage or injury of any kind whatsoever suffered by the Customer arising directly or indirectly from any breach of any of T&G's obligations arising under or in connection with this agreement or from any cancellation of this agreement or from any negligence, misrepresentation or other act or omission on the part of T&G, its servants, agents or contractors, nor shall T&G be liable for any loss, damage or injury caused to the Customer's servants, agents, contractors, customers, visitors, tenants, trespassers or other persons whomsoever (whether similar to the foregoing or not) arising as aforesaid. The Customer shall indemnify T&G against any claim by any of the foregoing persons in respect of any loss, damage or injury arising as aforesaid.
- 9.6 **Customer liability:** The Customer shall be liable for any loss or damage to any equipment or property belonging to T&G (whether in the possession of the Customer or otherwise) where such loss or damage is caused directly or indirectly by any act or omission of the Customer.

10. INDEMNITY

- 10.1 **Customer indemnity:** The Customer shall indemnify T&G against all claims, proceedings, losses, costs, expenses or damages suffered or incurred by T&G arising out of, or in connection with, any failure by the Customer to perform its obligations under the Terms.

11. SUBCONTRACTING

- 11.1 **Subcontractors:** T&G may subcontract the performance of the Services to its agents and subcontractors. T&G shall be responsible for the acts and omissions of any agent or subcontractor, as well as for ensuring that the agent or subcontractor performs the Services in accordance with the Terms as if T&G had performed the relevant services itself.

12. CONFIDENTIALITY

- 12.1 **Confidentiality:** Subject to clause 12.2, if, in the performance of its obligations under the Terms, a party becomes aware of secret and confidential information belonging to another party (including information which may not be relevant to the subject matter of the Terms) such party shall keep secret and confidential and not disclose the same to any third party (except those of its officers and employees who must necessarily know the same for the purpose of carrying out their duties). Each party shall ensure that those of its officers and employees to whom secret and confidential information belonging to the other party may be disclosed or who may become aware of such information, are instructed that they are dealing with secret and confidential information belonging to the other party and that it is to be treated as such.
- 12.2 **Privacy Act:** T&G shall be entitled to hold any personal information that it receives from the Customer for the purposes of its own marketing and Product development, account administration and credit purposes. The Customer agrees that T&G may ask for and disclose personal information about the Customer to any person named by the Customer as a credit reference in connection with the Customer's account, and to any person in circumstances reasonable deemed necessary by T&G in order to protect T&G's interests in respect of its relationship with the Customer.

13. FORCE MAJEURE

- 13.1 **Force majeure:** T&G shall not be liable for any delay or failure to perform its obligations under the Terms 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.
- 13.2 **Termination:** T&G may terminate the performance of its obligations in respect of the Services to which the Force Majeure relates, immediately by giving written notice to the Customer if the delay arising directly out of Force Majeure continues for more than five consecutive Business Days.

14. DISPUTE RESOLUTION

- 14.1 **Disputes:** In the event of any dispute arising between the parties in relation to the Terms (including the validity, breach, or termination of the Terms), the parties shall, without prejudice to any other right or entitlement they may have pursuant to the Terms 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 such techniques shall be as agreed between the parties or as selected by the President of the New Zealand chapter of LEADR.
- 14.2 **Arbitration:** In the event the dispute is not resolved by such agreement within 14 Business Days of written notice by one party to the other of the dispute (or such further period agreed in writing by the parties), either party may refer the dispute to arbitration. The arbitrator shall be agreed between the parties within 10 Business Days of written

notice of referral by the referring party to the other party or, failing agreement, appointed by the President of the Auckland District Law Society from time to time or its successor organisation. 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.

14.3 **Court proceedings:** Notwithstanding anything to the contrary 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.

14.4 **Continuation of performance:** For the avoidance of doubt, the existence of a dispute shall not relieve either party from its obligations under the Terms generally and, notwithstanding the dispute, each party shall continue to perform such obligations in accordance with the Terms to the maximum extent possible (having regard to the nature of the dispute).

15. GENERAL

15.1 **Good faith:** The parties shall act in good faith towards each other in respect of all dealings or matters under, or in connection with, the Terms.

15.2 **Compliance with laws:** Each party shall, in performing its obligations under and in connection with the Terms, comply with all relevant legislation and other laws.

15.3 **Further assurances:** Each party shall make all applications, execute all documents and do all acts and things reasonably required to implement and to carry out its obligations under the Terms.

15.4 **Waiver:** Any delay, failure or forbearance by T&G to exercise (in whole or in part) any right, power or remedy under, or in connection with, the Terms shall not operate as a waiver of such right, power or remedy. A waiver of any breach shall not be, or be deemed to be, a waiver of any other or subsequent breach.

15.5 **Severance:** If any clause or part of a clause of the Terms is held to be invalid or unenforceable, for whatever reason, the remaining clauses shall remain in full force and effect.

15.6 **Relationship:** The parties agree that nothing in, or in the performance of, the Terms shall be read or construed as creating any relationship between the parties other than the contractual relationship established by the Terms, and that nothing in the Terms shall be deemed to constitute either party the partner, agent or representative of the other party.

15.7 **No authority to act:** No party shall have the power or authority to act for or to incur any obligation or responsibility on behalf of another party except as specifically provided by the Terms.

15.8 **Assignment:** No party shall assign any of its rights or obligations under the Terms without the prior written consent of the other party, such consent not to be unreasonably withheld.

15.9 **Governing law:** The Terms shall be governed by, and interpreted in accordance with, the laws of New Zealand, and the parties submit to the exclusive jurisdiction of the courts of New Zealand.