

## VISCOUNT FCC LIMITED (FCC) - STANDARD TERMS AND CONDITIONS OF SUPPLY

In these Terms and Conditions, the following words and expressions have the following meanings:

- "Authorised Account Holder" means a person who holds a valid account with FCC, which at the relevant time has not been cancelled or suspended by FCC and includes, without limitation, any person who takes part in any of the Netting Systems with the authority of FCC;
- "Authorised Transferee" means, subject to clause 2.4, any Authorised Account Holder and any other person who FCC has authorised any Recipient to Transfer Equipment to and who has been allocated an account number or code by FCC;
- "Business Day" means any day on which registered banks in New Zealand are open for general banking business in Auckland, but excluding Saturday and Sunday;
- "Charges" means the Deposit and any Usage Fee for the Equipment, plus any GST payable thereon;
- "Credit Period" means FCC's internal rolling fortnightly period, which commences at midnight on a Friday and ends at midnight on the second Friday thereafter;
- "Defunct Equipment" means any Equipment that, in FCC's opinion, has been damaged, destroyed or lost, such that it cannot be Returned or no longer has any economic value to FCC as Equipment, as determined by FCC in its sole discretion;
- "Deposit" means the sum payable to FCC for the Equipment, as set out in the Schedule to these Terms and Conditions and modified by notice from FCC from time to time;
- "Depot" means any one of FCC's depots at which the Recipient may collect or return Equipment, as set out in the Schedule to these Terms and Conditions and as modified by notice from FCC from time to time;
- "Equipment" means plastic crates, plastic bins, wooden pallets or any other packaging equipment owned by FCC and Supplied to the Recipient from time to time;
- "FCC" means Viscount FCC Limited trading under the name "Viscount FCC"
- "Force Majeure" means any circumstances or events beyond the reasonable control of FCC including, without limitation, any acts of God or the public enemy, flood, earthquake, storm, cyclone, tornado, hurricane, lightning, fire, explosion, epidemic, war, embargoes, riot or civil disturbances, lock outs, strikes or other labour disputes or industrial action;
- "Grower(s)" means grower(s) of Produce;
- "Grower Recipient" means any Recipient who is also a Grower;
- "GST" means the goods and services tax chargeable under the Goods and Services Tax Act 1985 and any penalties, additional tax or interest in respect thereof;
- "Intellectual Property" means, without limitation, any patents, utility models, design rights, trade marks, copyright, moral rights, know-how or inventions and any applications therefor, whether registrable or not, in any country, whether currently existing or created in the future;
- "Merchant(s)" means the market(s), merchant(s) or broker(s) selling or trading Produce;
- "Netting System" means the deposit refund and transfer system(s) of FCC operated between Recipient(s), Merchant(s), Retailer(s) and FCC and any of them, as described in clauses 5.2 and 5.3;
- "Original Recipient" means a Recipient who receives Equipment from FCC;
- "Produce" means fresh fruit and vegetables or other plant produce;
- "Recipient" means any person that hires the Equipment in accordance with these Terms and Conditions or who is in possession of the Equipment at any time;
- "Related Company" has the meaning given that term in the Companies Act 1993, provided that the term 'company' where used in the definition shall be deemed to include a company wherever incorporated;
- "Retailer(s)" means purchaser(s) of Produce from Grower(s) or from Merchant(s);
- "Return" means the return of any Equipment to FCC at a Depot and "Returns" and "Returned" shall be construed accordingly;
- "Supply" means the supply of each unit of Equipment by FCC, which includes making the Equipment available at a Depot for the Recipient to collect or otherwise available to the Recipient's nominated carrier and "Supplied" and "Supplies" shall be construed accordingly;
- "Transfer(s)" means any transfer of possession of Equipment by a Recipient and "Transfer" and "Transferred" shall be construed accordingly;
- "Transferor" means any person who transfers Equipment;
- "Unauthorised Transferee" means anyone to whom the Recipient intends to Transfer, or has Transferred, Equipment, who is not FCC or an Authorised Transferee; and
- "Usage Fee" means the fee charged by FCC for the use of Equipment, calculated on the basis that such use is in accordance with these Terms and Conditions, as set out in the Schedule to these Terms and Conditions and as modified by notice from FCC from time to time.

### 1. ACCEPTANCE OF TERMS AND CONDITIONS

- 1.1 The Supply to, or the use or appropriation by, a Recipient of Equipment shall be deemed to be acceptance by the Recipient of these Terms and Conditions.
- 1.2 FCC may alter these Terms and Conditions at any time and from time to time. Notice of any alteration(s) by FCC may be published on the website [www.viscountfcc.co.nz](http://www.viscountfcc.co.nz) and any Supply of Equipment to a Recipient after the time of publication of the alteration(s) on the website shall be deemed to be acceptance by the Recipient of such alteration(s) to these Terms and Conditions.

### 2. HIRE OF EQUIPMENT

- 2.1 FCC shall retain full legal and equitable title in all Equipment, notwithstanding that FCC is not in possession of such Equipment. Any other person in possession of Equipment has no title, property or interest in the Equipment, except as bailee.
- 2.2 The Recipient shall not sell, lease, transfer, assign, charge, grant a lien over or security interest in, the Equipment, other than in accordance with these Terms and Conditions.
- 2.3 Subject to clause 2.4 below, the Recipient shall not Transfer the Equipment to any person other than an Authorised Transferee or FCC, or a carrier for the purposes of delivering Equipment to an Authorised Transferee or FCC. If the Transferor has any cause to doubt whether the proposed transferee is an Authorised Transferee, they must contact FCC to seek confirmation that the proposed transferee is an Authorised Transferee. An Authorised Transferee to whom Equipment is Transferred shall, upon the Transfer, become a Recipient and be bound by these Terms and Conditions.
- 2.4 In the event that the Recipient wishes to Transfer Equipment to an Unauthorised Transferee, the Recipient shall first request FCC's permission (which may be withheld, in FCC's absolute discretion). If FCC grants the Recipient permission to transfer Equipment to an Unauthorised Transferee it shall be on the condition that the Recipient shall comply with any terms imposed by FCC associated with that permission and that any proposed Unauthorised Transferee agrees to be bound by these Terms and Conditions prior to the Transfer of any Equipment to them, whereupon that Unauthorised Transferee shall become an Authorised Transferee.
- 2.5 Any person who intends to or who effects any Transfer of Equipment, other than through a Netting System, shall notify FCC of that proposed Transfer 2 (two) Business Days prior to its occurrence.
- 2.6 FCC may refuse or cease to Supply any Equipment generally or to any Recipient and/or determine that any person shall cease to be an Authorised Transferee, without notice and in its absolute discretion.
- 2.7 If FCC ceases to supply or withdraws any type of Equipment, FCC shall not be liable to pay any Deposit to any person returning such type of Equipment at any time after 3 months have elapsed from the date on which FCC has given notice that it has ceased to supply or withdrawn that type of Equipment.

### 3. USE OF EQUIPMENT

- 3.1 Recipients may only use Equipment for the purposes of packaging, transporting, displaying and selling Produce to be supplied to retail outlets, wholesale markets or other markets at which Produce is sold in New Zealand, unless any such market is expressly excluded by FCC as a market in or at which the Recipient may use the Equipment, as notified by FCC from time to time. This use expressly excludes using Equipment as stands for support of any retail display.
- 3.2 Equipment is hired to the original Recipient for one use only. The Recipient must not use or retain possession of Equipment for any more than one Credit Period following the date of the invoice issued by FCC to the Recipient in respect of that Equipment unless otherwise authorised by FCC pursuant to clause 3.6.
- 3.3 If Equipment is used or retained for more than one Credit Period following the date of the invoice issued by FCC to the Recipient in respect of that Equipment, FCC may exercise its rights set out in clause 6.5 below and/or FCC may charge the Recipient an additional Usage Fee for every Credit Period (or part thereof) that Equipment has not been Returned or Transferred, beyond the date of the invoice issued by FCC to the Recipient in respect of that Equipment.
- 3.4 Recipients may not store or display any item in or on Equipment other than Produce. This includes, without limitation, any goods including any:
- clothes;
  - plants;
  - bottled or canned foods, fish or meat;
  - spare parts or chemicals; or
  - general goods of any description.
- 3.5 Recipients may only use the Equipment described as "blue-grey handled 25 litre crates" for the purposes of packing, transporting, displaying and/or selling mushrooms.
- 3.6 If a Recipient wishes to use Equipment for any purpose not otherwise permitted by this clause 3, including, without limitation, for long term storage, the Recipient must first obtain FCC's express written permission (which may be withheld, in FCC's absolute discretion). In the event that such permission is granted, the Recipient shall comply with any conditions FCC may impose for such use for the duration of such use and undertakes to FCC to pay any additional Usage Fees FCC may charge for such use.
- 3.7 Recipients must not deface, cover, remove or interfere with any logo, trade mark, name or other identifying mark, feature, colour or printing on any Equipment, nor attach staples or other devices or things to any Equipment.
- 3.8 Recipients must take all reasonable steps to ensure that Equipment does not become contaminated by hazardous, corrosive, toxic, radioactive or any other dangerous or undesirable substance and Recipients shall take all reasonable steps to ensure that they do not cause, permit or authorise any third party to so contaminate Equipment.
- 3.9 The Recipient must take all reasonable steps to keep Equipment clean and tidy and not to damage or destroy Equipment or cause, permit or authorise any third party to do so.
- 3.10 Risk in the Equipment passes with the Transfer of such Equipment and the Recipient shall ensure that it has adequate insurance to cover the Recipient for any loss of or damage to any such Equipment. For the avoidance of doubt, the Recipient shall be liable to FCC for any damage suffered by FCC for any such lost, stolen or damaged Equipment and any Defunct Equipment.

3.11 The Recipient shall not infringe, nor shall the Recipient permit or cause, any infringement of, any Intellectual Property rights any third party may have in the Equipment, including, without limitation making, reproducing, promoting, selling, transferring or using any Equipment that is an infringing copy of the Equipment.

#### **4. PAYMENT OBLIGATIONS AND CHARGES**

4.1 FCC will calculate the Charges as at the last day of each Credit Period and send an invoice to the original Recipient and any other relevant Recipient for the Charges and the Recipient shall pay the Charges, in accordance with these Terms and Conditions. Any invoice relating to Equipment, whether issued by FCC will be governed by these Terms and Conditions.

4.2 FCC may amend any or all of the rates of the Charges at any time and from time to time and such amended Charges shall take effect on the date on which FCC provides notification of those Charges in accordance with these Terms and Conditions.

4.3 The invoice provided to the Recipient by FCC will set out FCC's determination of the Equipment hired by the Recipient during any given Credit Period and the Charges payable in respect of such Equipment, including details of any changes to the Charges arising during that Credit Period due to (i) any additional Supplies; (ii) Transfer(s); (iii) Return(s); or (iv) any other matters.

4.4 If the Recipient has any cause to dispute the details set out in an invoice, the Recipient must notify FCC of this dispute within 21 days from the date of the invoice in dispute. If the Recipient fails to notify FCC within that 21 day period and there is no obvious clerical error on the invoice, that invoice will be deemed to be evidence of the Equipment hired by the Recipient and the Charges payable in relation to such Equipment, which shall not thereafter be disputed by the Recipient.

4.5 In any notification issued by the Recipient pursuant to clause 4.4, the Recipient must state why the relevant invoice is disputed and provide evidence of the amount of Charges the Recipient believes it should be charged. FCC and the Recipient shall take all reasonable steps to negotiate an agreed level of Charges for a period of 14 days from the date of the notice disputing the invoice. Thereafter, if the dispute cannot be settled by negotiation, each party may pursue any rights and remedies available to it in respect of the disputed invoice. Pending the resolution of the dispute, both parties shall continue to perform all their respective obligations under these Terms and Conditions.

4.6 Notwithstanding clause 4.4, the Recipient will pay FCC all Charges set out in any invoice prior to the end of the Credit Period following the Credit Period in which the invoice relating to those Charges was issued by FCC, without any deduction or set off.

4.7 If the Recipient fails to pay the full amount of the Charges in accordance with clause 4.6 above, then FCC may, without prejudice to any other rights and remedies FCC may have, charge the Recipient and the Recipient shall pay, late payment fees of 15% per annum on the outstanding Charges, compounded monthly until such Charges are paid in full.

4.8 FCC reserves the right to deduct from any monies owed by FCC to the Recipient or any Authorised Transferee any reasonable costs incurred in:

- a) remedying any damage to Equipment; or
- b) disposing of any rubbish or goods left in Equipment at the time of the Return; or
- c) collecting any unpaid amounts owed by the Recipient or Authorised Transferee to FCC.

4.9 FCC will be under no obligation to refund to any person any Deposit for any Defunct Equipment.

a) Without prejudice to clause 3.3 above, if a Recipient retains Equipment for longer than is permitted by these Terms and Conditions, FCC may charge the Recipient Usage Fee(s) to reflect such period.

#### **5. NETTING SYSTEMS**

5.1 The Recipient agrees to take part in any Netting System(s) at the request of FCC. In the event that FCC requires a Recipient to take part in a Netting System, clauses 5.2 to 5.4 shall apply.

5.2 "Merchant Netting" is defined as and shall operate as follows, provided that in each case, the Transfer is to an Authorised Account Holder:

- a) FCC will supply the Equipment to a Grower Recipient and will invoice the Grower Recipient for the Charges relevant to that Equipment;
- b) when the Grower Recipient Transfers Equipment to the Merchant, the Merchant shall notify FCC electronically of the receipt of that Equipment by the Merchant;
- c) upon receipt of the notification referred to in clause 5.2(b), FCC shall credit the Grower Recipient's account and debit the Merchant's account for the Deposit related to the Equipment. The Merchant shall then be liable to pay to FCC the Deposit associated with that Equipment. This is without prejudice to the Grower Recipient's obligations to pay to FCC all Usage Fees.

The Grower Recipient and the Merchant agree that any errors or queries relating to the Deposit and/or the Equipment shall be directed to and dealt with by the Merchant in the first instance and that FCC shall be under no obligation to assist in resolving any dispute between the Grower Recipient and the Merchant.

5.3 "Retailer Netting" is defined as and shall operate as follows, provided that in each case, the Transfer is to an Authorised Account Holder:

- a) FCC will supply Equipment to a Grower Recipient and will invoice the Grower Recipient for the Charges relevant to that Equipment;
- b) when the Grower Recipient Transfers the Equipment directly to a Retailer, the Retailer will notify FCC electronically of the receipt of that Equipment by the Retailer;
- c) upon receipt of the notification referred to in clause 5.3(b), FCC shall credit the Grower Recipient's account and debit the Retailer's account for the Deposit related to the Equipment. The Retailer shall then be liable to pay to FCC the Deposit associated with that Equipment. This is without prejudice to the Grower Recipient's obligations to pay to FCC all Usage Fees.

5.4 By agreeing to take part in any of the Netting Systems, each person agrees to be bound by these Terms and Conditions and any additional FCC terms and conditions applying to the relevant Netting System.

5.5 If the Recipient is not taking part in a Netting System, the Recipient shall take part in the Deposit refund transfer system which shall operate as set out below, provided in each case, that the Transfer is to an Authorised Account Holder:

- a) FCC shall Supply Equipment to the Recipient and invoice the Recipient for the Charges relevant to that Equipment;
- b) if the Recipient Transfers Equipment to a Merchant, the Merchant shall pay to the Recipient a sum equal to the Deposit on the Transferred Equipment;
- c) if the Merchant Transfers Equipment to a Retailer, that Retailer shall pay to the Merchant a sum equal to the Deposit, on the Transferred Equipment;
- d) if the Recipient Transfers Equipment directly to a Retailer, the Retailer shall pay to the Recipient a sum equal to the Deposit, on the Transferred Equipment; and
- e) Subject to the Netting Systems, FCC shall pay a sum equal to the Deposit to any Authorised Account Holder effecting the Return of the Equipment, within 14 days of any such Return, provided that Equipment is not Defunct Equipment and is Returned in accordance with these Terms and Conditions.

5.6 The Recipient may not participate in any internal deposit refund and transfer system with another person, such that Equipment is not Returned to FCC within the relevant Credit Period, without FCC's prior written permission (which may be withheld, in FCC's absolute discretion). If that permission is granted, the Recipient shall comply with any conditions associated with such permission. If FCC becomes aware of any participation by any person in an internal Deposit refund and transfer system, FCC may exercise its rights of seizure under clause 6.5 and charge the Recipient additional Usage Fees.

#### **6. DAMAGES AND REMEDIES**

6.1 Except for any non-excludable rights in law, any warranties, conditions or representations that might be implied into these Terms and Conditions or any contract between the parties in respect of the use of the Equipment, by law or otherwise, are hereby expressly excluded.

6.2 FCC shall not be liable for any loss or damages caused by any delay, failure or refusal by FCC to Supply the Equipment.

6.3 FCC will not be liable to any party, whether in tort, contract or otherwise for any direct or indirect loss or damage howsoever caused, including if caused by:

- a) the use of Equipment by any person;
- b) any breach by FCC of its obligations under these Terms and Conditions or for any defect in Equipment; or
- c) any negligent act or omission by FCC, its related companies or their employees,

that exceeds the Charges paid by the person in respect of the particular Equipment in question under these Terms and Conditions in the 3 month period prior to the loss or damage arising.

6.4 FCC will not be liable for any direct or indirect loss or damage caused by:

- a) packaging, transporting or selling any Produce or any other item in Equipment; or
- b) any failure in any Equipment to contain the Produce; or
- c) the misuse of Equipment by any person.

6.5 If Equipment is used other than in accordance with these Terms and Conditions or the Recipient is in breach of any obligation these Terms and Conditions, then, without prejudice to any other rights and remedies FCC may have, the Recipient hereby grants FCC the right to enter upon any land or premises in the Recipient's ownership or control, including the right to force entry, in order to take possession of Equipment. Where such land or premises are not owned by, or under the control of, the Recipient, the Recipient shall procure the grant of the right of entry and seizure to FCC without any liability on the part of FCC to the owner of the land or premises in question or otherwise. Where this is not possible, the Recipient shall deliver all Equipment to FCC, within 3 days of a demand by FCC. FCC will not be obliged to refund the Deposit paid in respect of any such recovered Equipment to any person.

6.6 The Recipient shall indemnify FCC and keep FCC indemnified against any loss or damage incurred by FCC arising out of any use of the Equipment by the Recipient or any Transferee or the exercise by FCC of any of its rights under these Terms and Conditions.

#### **7. TERMINATION**

7.1 FCC may immediately and without notice terminate the hire of any Equipment at any time if there is an Event of Default.

7.2 Each of these events or circumstances is an Event of Default:

- a) if the Recipient fails to pay any amount that is due and payable by it under these Terms and Conditions or any terms and conditions governing a Netting System when it is due;
- b) if the Recipient fails to comply with any of its obligations under these Terms and Conditions or any terms and conditions governing a Netting System; and
  - i) that failure cannot be remedied; or
  - ii) that failure can be remedied and the failure is not remedied within 5 Business Days of the date on which FCC notifies the Recipient to remedy it;
- c) if the Recipient or any of its subsidiaries becomes unable to pay its or their debts when they fall due;
- d) if the Recipient ceases for any reason to be able lawfully to carry out all the transactions which these Terms and Conditions contemplate may be carried out by it; and
- e) if all or any material provision of these Terms and Conditions is or becomes void, voidable, illegal or unenforceable.

7.3 The Recipient must immediately Return, at its own expense, any Equipment in its possession or control as soon as it becomes aware of the termination. In the event that any such Equipment is not Returned promptly, FCC may, without prejudice to its other rights, charge and the Recipient shall continue to pay a Usage Fee for each Credit Period until all equipment is Returned.

8. **WARRANTY**

8.1 The Recipient warrants that all information supplied to FCC in connection with these Terms and Conditions will, at the time it is supplied, be true and correct in all respects and the Recipient shall notify FCC of any changes to that information immediately throughout the term of these Terms and Conditions.

9. **ASSIGNMENT**

9.1 The Recipient must not assign or purport to assign any of its rights under these Terms and Conditions, without the prior written consent of FCC. FCC may assign its rights under these Terms and Conditions by written notice to the Recipient.

10. **FORCE MAJEURE**

10.1 If any obligation of FCC under these Terms and Conditions is affected by Force Majeure, FCC will notify the Recipient of the nature and extent of the circumstances of the Force Majeure. Notwithstanding any other provision of these Terms and Conditions, FCC will not be in breach or otherwise be liable for any delay in the performance or the non-performance of its obligations under these Terms and Conditions to the extent that the delay or non-performance is due to Force Majeure.

11. **GUARANTEE**

11.1 The Recipient must, if requested to do so by FCC, procure one or more persons acceptable to FCC to provide a guarantee in favour of FCC, of the due performance of these Terms and Conditions by the Recipient, in a form and substance required by FCC.

12. **GENERAL**

12.1 FCC may give any notice under these Terms and Conditions by posting such notice on its web page at [www.viscountfcc.co.nz](http://www.viscountfcc.co.nz) and by publishing such notice in a national newspaper, and any such notice shall be deemed to have been received upon its appearance in both such places. A notice or invoice under these Terms and Conditions may also be sent to the addressee by mail or by fax, in which case such notice need not be published in a national newspaper. If sent by mail, the notice or invoice will be deemed to have been received on the Business Day following the day of postage. If sent by fax, it will be deemed to have been received when the sender's fax system generates a message confirming successful transmission of the total number of pages of the notice provided that this is prior to 4.00pm (local time in the place of receipt), and otherwise receipt shall be deemed to take place on the next Business Day.

12.2 Each Recipient authorises FCC to disclose such information and to such persons in respect of that Recipient as FCC consider necessary in their sole discretion in connection with the operation of the business of FCC.

12.3 Time is of the essence in respect of the Recipient's obligations under these Terms and Conditions.

12.4 The Recipient must not set off any amount that is payable by the Recipient to FCC against any amount that is payable by FCC to the Recipient pursuant to these Terms and Conditions or otherwise.

12.5 The Recipient acknowledges that these Terms and Conditions are confidential information belonging to FCC and accordingly agrees to keep its terms, including, without limitation, any financial information, applicable rates, charges or discounts, confidential and shall not disclose such information or make it or any copy of these Terms and Conditions available to any third party.

12.6 The laws of New Zealand govern these Terms and Conditions and the parties submit to the exclusive jurisdiction of the courts of New Zealand and courts entitled to hear appeals from those courts.

12.7 In the construction of these Terms and Conditions, unless the context requires otherwise:

- a) words or phrases appearing in these Terms and Conditions with capitalised initial letters are defined terms and have the meanings given in these Terms and Conditions;
- b) headings appear for convenience only and do not affect the construction of these Terms and Conditions;
- c) the singular includes the plural and vice versa, and words importing one gender include the other gender;
- d) a reference to "written" or "in writing" includes all modes of presenting or reproducing words, figures and symbols in a tangible and permanently visible form;
- e) a reference to a person includes a corporation sole and also a body of persons, whether corporate or un-incorporate;
- f) use of the words "including" or "includes" means including, but not limited to, or includes without limitation; and
- g) a reference to a prohibition against doing anything includes a reference to not permitting, suffering or causing that thing to be done.