

Flower Power (NZ) Limited (“Flower Power”) Terms of Trade



1. DEFINITIONS AND INTERPRETATION

1.1. Definitions

In this Agreement, unless the contrary intention appears or the context requires otherwise:

Agreement means “these Terms and Conditions and any appendix or schedule to them”;

Charges mean the “charge or charges for the Services as listed in the Price Schedule”;

Confidential Information means “information relating to the Customer’s business affairs received by Flower Power in the course of providing the Services but excludes all information, which is in the public domain or was known by Flower Power prior to the disclosure by the Customer”;

Contract Period means “the 36 month period commencing on the Start Date and each succeeding 36 month period throughout the Term of the Agreement”;

Customer means “the party named, its subsidiaries, successors and permitted assigns”;

Force Majeure Event means “any event outside the party’s reasonable control, including but not limited to an act of nature, government or quasi-government act or regulation, riot, act of terrorism, war, flood, fire, industrial disputes, epidemic, or any risk to health or safety”;

Goods means “any goods provided by Flower Power”;

GST means “any consumption tax, goods and services tax, value-added tax and any similar tax, impost or duty”;

Initial Term means “the period specified on page 2 (or if not so specified, the period of 36 months) commencing on the Start Date”;

Insolvency Event includes the winding up, dissolution or cessation of business, the appointment of an administrator, or an official manager, an assignment for the benefit of creditors, scheme or arrangement with creditors, insolvency, bankruptcy of a party or any similar procedure;

Personal Information has the meaning assigned to it in the Privacy Act; Privacy Act means “the Privacy Act 1993 as amended, and includes the regulations and any guidelines issued by the Privacy Commissioner from time to time”;

Services means “all of the services including, but not limited to, the supply of oils, collection and removal of waste oils, filter cleaning, chemical supplies and commercial kitchen cleaning as referred to in the Price Schedule; and the additional services offered by Flower Power and requested by the Customer from time to time”;

Special Conditions means “those conditions agreed by both parties and specified as such on the cover sheet of this Agreement”;

Start Date means “the date specified as the start date on page 2 of this Agreement, or if no date is specified, the date that this Agreement is executed by both parties”;

Term means “the term of this Agreement, being the Initial Term plus any subsequent rollover periods pursuant to clause 3.2”.

1.2. Interpretation

In this Agreement, unless the contrary intention appears:

a. The singular includes the plural and vice versa;

b. A reference to a person includes a reference to the person’s executors, administrators, successors, substitutes, assigns, employees, agents, representatives and contractors;

c. If a period of time is specified, and dates from a given day or the day of an act or event, it is to be calculated exclusive of that day;

d. Headings in this agreement are inserted for convenience and do not affect the interpretation of this agreement;

e. A reference to a statute, mandatory guideline or other law includes regulations and amendments, or replacements of that statute, ordinance, code, guideline or law;

f. A reference to a clause or provision is a reference to a clause or provision under this Agreement.

1.3. The Special Conditions form part of this Agreement and prevail to the extent of any inconsistency between the Special Conditions and the Terms and Conditions of this Agreement.

1.4. Consumer Guarantees Act 1993: Where the Customer is a business (as “business” is defined in the Consumer Guarantees Act 1993), the Customer agrees that it is acquiring the Company’s services for the purpose of a business and that the Consumer Guarantees Act 1993 does not apply. Where the provisions of the Consumer Guarantees Act apply, these Conditions will be read subject to the application of that Act, and in the case of any conflict, the provisions of that Act will apply.

2. SERVICES

2.1. Flower Power agrees to provide the Services to the Customer on the Terms and Conditions of this Agreement and the Customer agrees to engage Flower Power exclusively to provide the Services pursuant to the Terms and Conditions of this Agreement for the Term.

2.2. Flower Power agrees, having regard to the nature of the Services being provided, to perform the Services in a proper and professional manner and in accordance with industry practice.

3. TERM OF THE AGREEMENT

3.1. This Agreement commences on the Start Date and continues for the Initial Term unless terminated earlier in accordance with clause 8. Either party may terminate this Agreement with effect from the end of the Initial Term by giving the other party written notice not less than 30 days before the end of the Initial Term.

3.2. If this Agreement is not terminated as at the end of the Initial Term, this Agreement continues automatically for equal succeeding periods (equivalent to the Initial Term) until it is terminated with effect from the end of the then current period by either party giving written notice to the other not less than 30 days before the end of that current period.

4. CHARGES AND PAYMENT

4.1. In consideration of the provision of Services by Flower Power, the Customer must pay the Charges to Flower Power in full 20 days after the end of the month in which the invoice is dated unless specified otherwise on the invoice.

4.2. In addition to the Charges, the Customer will pay to Flower Power any GST or relevant taxes in respect of the provision of the Services, on the same date on which payment for the relevant Services are due and payable.

4.3. Flower Power may vary the Charges on renewal of the Term, by giving 30 days' notice to the Customer. The varied Charges will take effect from the date specified.

4.4. The Customer must pay an additional charge for any additional services requested by the Customer. The charges for additional services will be at Flower Power's then-current standard charge for that service (List Price).

4.5. All charges and payments payable by the Customer to Flower Power under this Agreement must be paid free of set-off and without deduction.

4.6. At Flower Power's discretion the payment of an advance deposit and authorised direct debit/credit authority may be required against charges to be rendered.

4.7. If the relevant payment is not received from the Customer by the date when it is due and payable, Flower Power may in addition to its rights and remedies at law or equity, do any one or more of the following:

- a. Charge the Customer interest on the outstanding amount from the due date, at a rate equivalent to the then Kiwibank Credit Card Rate as at the due date and charged daily;
- b. Recover from the Customer any reasonable costs, which Flower Power may incur in recovering any outstanding amounts from the Customer;
- c. Suspend all or part of any Service until the Customer has paid to Flower Power all outstanding amounts;
- d. Terminate this Agreement in accordance with clause 8; and
- e. Exercise its rights under the lien specified in clause 7.3(d).

5. SALE OF GOODS

5.1. Ownership of the Goods remains with Flower Power and does not pass to the Customer until the Customer pays all amounts owing to Flower Power in full in respect of the Goods.

5.2. The equipment is at the Customer's risk once within the Customer's possession. The Customer shall insure the equipment for full replacement value whilst in its possession and ownership has not passed to the Customer.

5.3. The Customer grants to Flower Power a security interest in the Goods and in any proceeds arising from the sale of the Goods to secure the obligations of the Customer to pay the purchase price for the Goods and any other obligations existing under the Terms and Conditions of this

Agreement.

5.4. The Customer waives the right to receive a verification statement in respect of any financing statement registered on the Personal Property Securities Register in respect of the security interest created by these terms

5.5. If the Customer is in material breach of this Agreement or this Agreement has been terminated, Flower Power may:

- instruct the Customer (in writing) to return the goods to Flower Power promptly and at such a place as directed where ownership has not passed to the Customer; or
- take possession of the goods, where ownership has not passed to the Customer. For the purposes of taking such possession, Flower Power, its employees or agents may enter the premises or place where Flower Power believes the goods to be located to enable Flower Power to recover the goods. In such event:

- a. The Customer gives licence to Flower Power, its employees and agents to enter, and otherwise to use reasonable force to enter, any premises or place to effect repossession without being liable to the Customer or to any person claiming under the Customer for doing so;
- b. The Customer releases Flower Power from any liability for reasonable damage incurred in repossessing or attempting to repossess the goods and indemnifies Flower Power, its employees and agents against any claims, actions, costs and losses any of them suffer or incur through the repossession or attempted repossession of the goods however arising; and
- c. Flower Power shall not be responsible in any way for any reasonable damage to the goods occurring during or after any repossession or attempted repossession.

6. FLOWER POWER OWNED EQUIPMENT

6.1. Except as otherwise specified in any Service Terms, Flower Power shall, at its own cost, insure any of its equipment (whether owned or leased by Flower Power) when located at the Customer's premises.

6.2. The Customer shall notify Flower Power promptly of any damage or loss of Flower Power equipment in the Customer's care.

6.3. If the Customer is in material breach of this Agreement or this Agreement has been terminated, Flower Power may take possession of its equipment. For the purposes of taking such possession, Flower Power, its employees or agents may enter the premises or place where Flower Power believes the equipment to be located to enable Flower Power to recover the equipment. In such event:

- a. The Customer gives licence to Flower Power, its employees and agents to enter, and otherwise to use reasonable force to enter, any premises or place to effect repossession without being liable to the Customer or to any person claiming under the Customer for doing so;

- b. The Customer releases Flower Power from any liability for reasonable damage incurred in repossessing or attempting to repossess the equipment and indemnifies Flower Power, its employees and agents against any claims, actions, costs and losses any of them suffer or incur through the repossession or attempted repossession of the equipment however arising; and
- c. Flower Power shall not be responsible in any way for any reasonable damage to the equipment occurring during or after any repossession or attempted repossession.

7. THE CUSTOMER'S ACKNOWLEDGMENTS

7.1. The Customer warrants that:

- a. The Customer is the owner of the used oil to be collected, or the authorised agent of the owner of the used oil, and has authority to contract with Flower Power on the terms of this Agreement.
- b. The used oil is not volatile, explosive, radioactive or otherwise dangerous and are not liable to damage any other property owned by any other person and the Customer acknowledges and agrees that if any of the used oil is or are liable to become so, Flower Power may at any time destroy, or render harmless that used oil without compensation to the Customer and without prejudice to any other rights of Flower Power whether under this Agreement or at law;
- c. The Customer will comply with applicable health and safety legislation and the reasonable directions of Flower Power to ensure the health and safety of all persons involved in the performance of the Services at its cost and the Customer acknowledges and agrees that where Flower Power is not reasonably satisfied with the Customer's compliance under this clause 7 it may suspend the relevant Service(s) until it is satisfied in relation to those issues;
- d. That the person executing this Agreement is authorised to do so on behalf of the Customer.

7.2. The Customer acknowledges and agrees that:

- a. Flower Power has relied on the Customer's warranties in clause 7.1 in providing the Services;
- b. The Customer is satisfied that the Services are suitable for its requirements;
- c. Without limiting its rights at law or equity Flower Power shall have a lien (general or particular, as the case may be) on the used oil for all sums payable by the Customer to Flower Power in respect of the Services.
- d. Flower Power is not a common carrier and does not have any liability to the Customer as such;
- e. Flower Power is not responsible for ensuring that the Customer complies with any statutory or other obligations that the Customer may have;
- f. In the event that Flower Power is unable to perform the Services requested by the Customer due to the Customer's default, and the Customer does not notify Flower Power prior to Flower Power commencing performance of the Services, the Customer will be liable to pay for those Services as if those Services had been rendered; and

- g. Where the Customer acquires Flower Power branded packaging materials it will not deal with such materials in any way that brings Flower Power into disrepute including, without limitation, disposing of the materials in a non-secure way.

8. TERMINATION

8.1. Without limiting their other rights under this Agreement, either party may terminate this Agreement with immediate effect by giving written notice to the other party if:

- a. An Insolvency Event occurs in respect of the other party; or the Customer becomes, or is deemed by Flower Power to be, an unacceptable credit risk; or
- b. The other party materially breaches this Agreement and fails to correct the breach within 14 calendar days after notice of that breach from the non-breaching party.
- c. Without limiting the above, the following matters, may, at Flower Power's discretion, constitute a material breach of this Agreement by the Customer:
 - i. The Customer has breached agreed payment terms.
 - ii. Any warranty or representation given by the Customer to Flower Power under this Agreement is materially false or misleading.

8.2. On receipt of notice of termination of this Agreement the parties will negotiate and agree to a reasonable plan for the transition which is consistent with Flower Power's then current standard operating practices. Such plan shall commence, subject to clause 4.7, at the expiry of the notice period. For the avoidance of doubt, unless otherwise agreed by the parties in writing, the provision of any Services during the transition out period shall be provided on the same Terms and Conditions as this Agreement.

8.3. On termination or expiry of this Agreement, the Customer must:

- a. Pay Flower Power, prior to the removal of waste oil or supply of oils or other Services:
 - i. all Charges, including Charges incurred to the date of termination or expiry of the Agreement and any Charges which accrue from the date of termination or expiry until cessation of Services; and
 - b. Return to Flower Power any equipment Flower Power has provided to the Customer for the provision of the Services, or allow Flower Power access to the Customer's premises to collect such equipment.

8.4. The Customer acknowledges that Flower Power has relied on information from the Customer as to the proposed period for which the Customer will require the Services in entering into this Agreement and setting the Charges. If the Customer terminates, or attempts to terminate, this Agreement during the Initial Term other than in accordance with this clause 8 or the Special Conditions, then the Customer agrees to pay to Flower Power, by way of liquidated damages, a sum equal to 100% of the Charges that would have been

payable to Flower Power by the Customer for the unexpired portion of the Initial Term had the Customer continued to utilise the Services at the average rate incurred during the immediately preceding three months. Furthermore, the Customer acknowledges and agrees that the liquidated damages described in this clause 8.4 represent a genuine pre-estimate of loss.

9. CONFIDENTIALITY OF RECORDS

9.1. Flower Power will take all reasonable measures to ensure that all Confidential Information held in connection with this Agreement is protected from misuse, unauthorised access, modification or disclosure.

9.2. The Customer will ensure that it has adequate processes in place for updating, amending or correcting Personal Information held by Flower Power in connection with this Agreement. Flower Power's obligations in this regard will be limited to retrieving the requested Records for the Customer, such retrieval to be treated as part of the Services and charged accordingly.

10. LIABILITY

10.1. To the extent permitted by law, all conditions and warranties not expressly included in this Agreement are excluded.

10.2. The Customer acknowledges that where it is acquiring the Services for business purposes, the provisions of the Consumer Guarantees Act 1993 are excluded.

10.3. Flower Power is not liable for and the Customer releases Flower Power from all liability in tort, contract, bailment or otherwise whether due to negligence, breach, wilful act or omission or any other cause in respect of any loss, damage, expense, injury or death arising out of or in connection with this Agreement.

10.4. To the extent permitted by law, and despite any other clause of this Agreement, Flower Power is not liable for any indirect economic or consequential losses arising out of or in connection with this Agreement, including, but not limited to, any loss of profits.

10.5. To the extent that Flower Power's liability cannot be limited in the manner provided in this clause 10, Flower Power's total aggregate liability under this Agreement whether relating to direct or indirect loss, (including liability due to negligence, breach or wilful act or default) for all claims arising out of or in connection with this Agreement in any Contract Period shall be limited to the amount which is equivalent to the sum of 12 months Charges paid by the Customer to Flower Power that preceded the claim, or \$10,000, whichever is the lesser.

10.6. Where any order, writ or mandatory instrument relating to the Services is served on or presented to Flower Power and appears on its face to be duly and properly created and executed, Flower Power may comply with it and the Customer indemnifies Flower Power for any loss or expenses in respect of Flower Power so complying.

10.7. The Customer is liable for and indemnifies

Flower Power in respect of all losses, of whatever nature, caused or contributed to by the Customer and incurred by Flower Power in connection with the provision of the Services.

11. GENERAL

11.1. Flower Power is taken to have duly delivered Services and/or Goods to an address if a person there signs for the Services or Goods.

11.2. The Customer authorises Flower Power to subcontract or assign the whole or any part of the provision of the Services.

11.3. Flower Power will be responsible for the actions of its subcontractors in the provision of the Services and every right, exemption from liability and defence to which Flower Power is entitled in accordance with this Agreement shall also be available and shall extend to protect all agents, employees, and subcontractors of Flower Power.

11.4. Any claim for missing or damaged Goods or Services must be made in writing to Flower Power within 14 days after delivery to the Customer, or of confirmation of loss.

11.5. No action, arising out of or in connection with this Agreement (other than an action by Flower Power for any amount due to Flower Power) may be brought more than one year after the cause of action first arose.

11.6. This Agreement will apply to the exclusion of all other Terms and Conditions provided to Flower Power from time to time by the Customer which may be, without limitation, in the form of a purchase or work order. If the Customer provides Flower Power with a purchase or work order containing Terms and Conditions, Flower Power's fulfilment of its obligations under this Agreement does not constitute acceptance of the Terms and Conditions of that purchase or work order.

11.7. This Agreement and any sub-schedules to this Agreement constitute the entire agreement between the parties and supersedes all previous oral or written proposals, representations, agreements and other communications between the parties in relation to the subject matter.

11.8. This Agreement may only be varied in writing by a document signed by a duly authorised officer of each party.

11.9. The failure by either party to observe or perform wholly or in part any obligation (other than an obligation to pay money) under this Agreement will not be a breach of this Agreement to the extent that the failure was caused by or arose as a result of a Force Majeure Event.

11.10. Any forbearance, indulgence or delay in enforcing any right or remedy by a party does not constitute a waiver of rights issued or in any way prejudice any right or remedy of that party.

11.11. If any part of this Agreement is unenforceable, invalid or void then that part of the Agreement is severed and the rights and obligations of the remaining parts of the Agreement continue to apply.

11.12. Any notice under this Agreement must be in

writing and delivered personally, by facsimile or email, or by courier or prepaid post to the last known facsimile number, email address or address of the Customer.

11.13. In addition to the transport charge a Flexible Fuel Factor (FFF) surcharge may be applied by Flower Power to account for fluctuations in transport fuel costs.

12. DISPUTE RESOLUTION

12.1. If a dispute arises under this Agreement, a party may give written notice to the other specifying the dispute and requiring its resolution under this clause (Notice of Dispute).

12.2. If the dispute is not resolved within 14 days of the Notice of Dispute, the parties may jointly refer the dispute to mediation in accordance with this clause.

12.3. If the parties are unable to agree on a mediator within 21 days of the Notice of Dispute, the mediator shall be appointed by the Chair of LEADR (Leading Edge Alternative Dispute Resolvers).

12.4. The parties must pay the mediator's fees in equal shares. Each party must pay its own costs of the mediation.

12.5. If the dispute is not resolved within 28 days after the appointment of the mediator, the parties shall be free to commence court proceedings.

12.6. This clause does not prevent any party from obtaining any injunctive, interlocutory or declarative relief from a court, which may be urgently required.

13. ASSIGNMENT AND CHANGES OF NAME

13.1. The Customer acknowledges that they may not transfer or assign any benefit or obligation under these Terms & Conditions to any third party without prior written consent from Flower Power, which will not be unreasonably withheld.

13.2. The Customer will formally notify Flower Power of any change of name prior to the change of name coming into effect.

13.3. Flower Power may at law assign its rights under this Agreement to any party at any time.

14. GOVERNING LAW

14.1. This Agreement is governed by the laws of New Zealand and the parties submit to the non-exclusive jurisdiction of the courts of New Zealand.