

## LYNDALE NURSERIES AUCKLAND LIMITED TERMS AND CONDITIONS OF SALE

The Company shall supply to the Buyer all goods & services, which for the purposes of the Personal Property Securities Act 1999 (“the PPSA”) are described in clause 1 below, despite anything that may be stated to the contrary in the Buyer’s enquiries or on the Buyer’s order; subject to the following terms and conditions.

### **1. Definitions**

- 1.1 In these terms and conditions, unless the context otherwise requires:
- a. “the Buyer” means the person buying the Goods from the Company.
  - b. “the Company” Lyndale Nurseries Auckland Limited and its assigns.
  - c. “the Due Date” means the date upon which all accounts are payable pursuant to clause 4 hereof.
  - d. A reference to a “person” includes any individual, firm, Company, corporation, government, or local body or other legal entity.
  - e. The “Goods” means all present and after acquired propagation material, young trees, shrubs, general trees and shrubs, gardening material and any other goods that may be described from time to time in any invoices rendered by the Company to the buyer.
  - f. ‘Services’ shall mean all services supplied by the Company to the buyer and includes any advice or recommendations, consultancy fees, delivery charges, planting costs and other related horticultural services.

### **2. Application of these Terms and Conditions**

- 2.1 These terms and conditions shall be deemed incorporated into and shall form part of all contracts involving Goods supplied by the Company to the Buyer.
- 2.2 No variation or modification of or substitution for these terms and conditions shall be binding on the Company unless specifically agreed to by the Company in writing and an order has been accepted, a contract for supply will be deemed to exist.
- 2.3 Where:
- a. A contract for the supply of Goods by the Company to the Buyer is comprised in a number of documents including these terms and conditions; and
  - b. There is a conflict between these terms and conditions and any one or more of the other documents that comprise the contract, then, in that circumstance the provisions of these terms and conditions shall prevail.

### **3. Price**

- 3.1 The Buyer shall pay the price indicated on the invoice for the Goods and Services issued by the Company.
- 3.2 Except where the Company has given a firm quotation for the Goods and has agreed in such quotation not to vary the price for the Goods, the Company reserves the right to vary the price of the Goods. The price payable by the Buyer for the Goods ordered shall be the price ruling at the date the Goods are dispatched for delivery to the Buyer.

### **4. Payment**

- 4.1 All accounts are payable by the 20<sup>th</sup> of the month following delivery or upon such other date which has been expressly agreed upon in writing between the Buyer and the Company (“the Due Date”).
- 4.2 Failure to pay any account by the Due Date shall be a breach of the Buyers obligations under these terms and conditions and without prejudice to any other rights or remedies the Company may have, the Buyer shall be liable to compensate the Company by paying as liquidated damages (in addition to the amount due) interest on the amount due from the due date until the date of payment at rate of 2% per Calendar Month.
- 4.3 If a dispute arises in relation to any account, the Buyer shall within 7 days (time being of the essence) advise the Company by notice in writing containing full particulars of such dispute. The undisputed portion of the account shall be payable upon the Due Date.
- 4.4 Receipt by the Company of any cheque or other bill of exchange or any promissory note shall not be deemed to be payment or conditional payment until the same has been, honoured or cleared and until such time shall not prejudice or affect the Company’s rights, powers or remedies against the Buyer and/or the Goods.
- 4.5 The Company may apportion payments made by the Buyer to outstanding accounts in such amounts and in such order as the Company may determine in its sole discretion.

### **5. Description**

- 5.1 Information regarding specifications, description, weight, measures, powers, capacities, performance and other information generally relating to the Goods contained in any advertisement, catalogue, price list, illustration or similar device is acknowledged by the Buyer as representative only and intended to present to the Customer a general guide.
- 5.2 Where Goods have been ordered by the Buyer pursuant to such description or a sample of Goods has been exhibited to and inspected by the Buyer to enable the Buyer to submit an order therefore the Company will use its best endeavours where practicable to enable the Buyer to compare the Goods with the sample to enable the Buyer to satisfy itself that the Goods company with either description or sample as the case may be prior to payment being made therefore by the Buyer to the Company.

### **6. Property**

- 6.1 Passes to the buyer on payment of the goods.

### **7. Risk and Delivery**

- 7.1 The risk of any loss, or damage to the Goods due to any cause whatsoever shall be borne by the Buyer from the time of despatch of the Goods.
- 7.2 The Buyer acknowledges that any period or date quoted for delivery of the Goods are approximate only. The Company will use its best endeavours to comply with such period or date but accepts no responsibility for any loss, injury, damage or expense consequent upon any delay in delivery.
- 7.3 Where delay is due to “force majeure” or other circumstances outside the direct control of the Company, such delay shall not entitle the Customer to cancel any order or to refuse to accept delivery.

**8. Phytosanitation**

8.1 Whilst every effort is made to ensure clean and healthy nursery conditions are maintained the sale of every product is done on the basis that the possibility of micro-organism presence is acknowledged.

**9. Damage or Loss in Transit**

9.1 No claim for damage in transit or shortage in delivery will be entertained unless a notice in writing specifying such damage or shortage is given to the carrier concerned and the Company within 7 days or receipt of Goods.

**10. Force Majeure**

10.1 The Company shall not be deemed to be in breach hereof or otherwise be liable for delay or non-performance of any of its obligations hereunder to the extent that such delay or non-performance is due to any Force Majeure.

10.2 For the purpose of the Supply Contract, "Force Majeure" means an event or circumstances beyond the reasonable control of the Company which causes a failure by the Company in the performance of any obligations imposed on it, hereunder such that by the exercise of reasonable diligence the Company could not have prevented or corrected such failure.

10.3 The events or circumstances included with the expression "Force Majeure" shall include but not be limited to acts of God, acts of War, sabotage, landslides, lightning, earthquakes, floods, storms, fires, washouts, severe drought, civil disturbances, explosions, industrial actions, strikes, lockouts and the order of any Court or competent governmental authority.

10.4 If the event or circumstance of Force Majeure is of such magnitude or is likely to be of such duration that it is either impracticable or unreasonable for the Company to perform or comply with or observe the provisions hereof, the Company may on not less than fourteen (14) days prior writing notice terminate the contract between it and the Buyer.

**11. Return of Goods**

11.1 The Company reserves the right in its absolute discretion to accept a return of the Goods or to credit the Buyer with the cost thereof in the event of acceptance of such a return.

**12. Default**

12.1 The Buyer shall be responsible for all costs and/or expenses incurred by the Company in instructing a solicitor and/or debt collecting agency, court costs and any other costs associated to recover any amount overdue for payment and such costs and expenses shall bear interest from the date upon which they are paid or incurred by the Company to and including the date upon which the Buyer shall pay or reimburse the Company. The Company reserves the right to refer details of the Buyer's account to a nationwide credit reporting agency.

12.2 In the event that:

- a. Any money payable to the seller becomes overdue, or in the seller's opinion the buyer will be unable to meet its payment as they fall due; or
- b. A receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Buyer or any asset of the Buyer; then
  - (i) the Seller shall be entitled to cancel all or part of any order of the Buyer which remains unperformed in addition and without prejudice to any other remedies; and,

(ii) all amounts owing to the seller shall, whether or not due for payment, immediately become payable.

**13. Title and Our Security Interests**

13.1 It is the intention of the Seller and agreed by the Buyer that the property in the goods shall not pass until:

- a. The Buyer has paid all amounts owing for the particular goods and,
- b. The Buyer has met all other obligations due by the Buyer to the Seller in respect of all contracts between the Seller and the Buyer, and that the Goods or proceeds of the state of the Goods, shall be kept separate until the seller shall have received payment and all other obligations of the Buyer are met.

13.2 It is further agreed that if the Buyer fails to return the Goods to the Seller then the Seller or the Seller's agent may enter upon and into the land and premises owned, occupied or used by the Buyer, or any premises as the invitee of the buyer, where the goods are situated and take possession of the goods, without being responsible for any damage thereby caused.

13.3 You acknowledge and agree that this Agreement constitutes a security agreement for the purposes of the PPSA and we retain a purchase money security interest in all Goods to secure our interest in the Goods and all moneys owing or payable by you under this Agreement. All goods sold to you are sold subject to a security interest in favour of us and we have the right to call for or recover any Goods at our option and you are obliged to deliver up the Goods if so directed by us.

13.4 Our security interest in the Goods:

- a. continues in any new goods into which those goods are attached, fixed or incorporated; and
- b. extends to any proceeds, book debts and accounts receivable arising from selling the Goods.

13.5 You waive any right to receive verification that our security interest in the Goods has been registered on the Personal Property Securities Register and agree that where relevant, the following sections of the PPSA are not applicable to this Agreement, sections 114(1)a, 116, 117(1)c, 199, 120(2), 121, 125, 126, 127, 129 and 131 to 134 (inclusive).

**14. Warranties Conditions and Limitation of Liability**

14.1 Where the Buyer enters into this agreement with the Company for the purposes of acquiring the Goods for the purposes of a business and where the agreement would otherwise be subject to the provisions of the CGA, the Buyer and the Company agree that the Goods supplied to the Buyer for business purposes in terms of sections 2 and 43 of the CGA and that the Provisions of the CGA do not apply.

14.2 Save as imposed upon it by any statute or regulation (and subject to clause 12.3) the Company shall not be bound by any statement, representation, warranty, condition or contractual obligation which is not expressly set forth in these terms and conditions or recorded in a written instrument signed by the Company and the Company's liability in any case of loss, defect or fault shall be limited to the purchase price of the Goods.

14.3 The provisions of Section 16 of the Sale of Goods Act 1908 are hereby expressly excluded and negated.

**15. Obligations**

- 15.1 You agree:
  - a. not to assign this Agreement or your rights under this Agreement without our prior written consent.
  - b. to indemnify us against any claims, losses, damages, liabilities and expenses of whatever nature:
    - i. to the extent that they arise in whole or in part out of your use of the Goods;
    - ii. arising in whole or part by any breach of this Agreement by you.

**16. Personal Property Securities Act 1999**

- 16.1 The Buyer grants to the Company a security interest in all present and after acquired Goods and their proceeds.
- 16.2 On the Company’s request the Buyer shall promptly execute any documents and do anything else required by the Company to ensure that the security interest created under these terms and conditions constitutes a first ranking perfected security interest over the Goods. The Buyer shall also provide the Company with any information the Company reasonably requires to complete a financing statement or financing charge statement.
- 16.3 The Buyer shall immediately notify the Company in writing of any change in the Buyer’s name.
- 16.4 The Buyer waives any right to receive a copy of a verification statement under the PPSA.
- 16.5 The Buyer will pay all costs, expenses and other charges incurred, expended or payable by the Company in relation to the filing of a financing statement or financing change statement.
- 16.6 The Buyer agrees that nothing in sections 114(1)(a), 133 and 134 of the PPSA shift apply to these terms and conditions of sale.
- 16.7 The Buyer agrees that its rights as debtor in sections 116, 120(2). 121. 125, 126. 127, 129, 131 and 132 of the PPSA shall not apply to these terms and conditions.
- 16.8 The Buyer will not allow a security interest to be created or registered over the Goods in priority to the security interest held by the Company.

**17. Termination**

- 17.1 We may terminate this Agreement by notice in writing to you if any of the following events occurs:
  - a. you do not pay any amount owed to us on the due date;
  - b. you fail to fulfil your obligations under this Agreement or otherwise breach any terms of this Agreement;
  - c. it becomes, or will become, illegal for you to comply with your obligations under this Agreement or all or part of this Agreement becomes invalid or unenforceable;
  - d. you cease or threaten to cease to carry on your business;
  - e. you are unable to pay your debts or are deemed or presumed to be unable to pay your debts, or take steps to benefit any of your creditors or stops or threatens to stop payments; or
  - f. a receiver, administrator or similar official is appointed in relation to any asset of you or you request the appointment of, or an application is made for the appointment of, any of those officials;

- g. an application is made or any steps taken for the bankruptcy or liquidation of you or you are declared or become bankrupt or insolvent; or
  - h. any step is taken to appoint, or with a view to appointing, a statutory manager or similar official of or to you (including the making of any recommendation under the Corporations (Investigation and Management) Act 1989, or you are declared at risk under the Act).
- 17.2 Termination of this Agreement by us will be without prejudice to our accrued rights, remedies and liabilities under the Agreement.

**18. Interpretation**

- 18.1 The terms and conditions herein shall be construed and shall take effect in all respects with New Zealand law.

**19. Acknowledgement**

- 19.1 The Buyer acknowledges that they have received a copy of these terms and conditions and in particular that these terms and conditions constitute a “security agreement” for the purposes of the PPSA and the Company may register a financing statement in respect of these terms and conditions.

**20. Orders**

- 20.1 Minimum quantity available – one half tray of any one variety except plug trays which are sold in full trays.
  - G60 grownets are sold 60 per tray
  - 4cm & 5cm tube lines are sold 50 plants per tray.
  - 6cm tube lines are sold 32 plants per tray.
  - No Charge for pots
  - Industry Propagation Trays charged out at \$10.00
  - Plastic Stacking Legs are charged out at \$1.50
  - Industry Propagation Trays and Stacking Legs are refundable on return at our discretion.
  - **Light Carrying Trays no longer refundable**

**Execution**

Signed By Customer: \_\_\_\_\_

Name of Signatory: \_\_\_\_\_

Position of Signatory: \_\_\_\_\_

Date: \_\_\_\_\_

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