

1. Definitions

“Seller” shall mean Faceys Nursery Pty Ltd and its successors and assigns.

“Buyer” shall mean the buyer or any person or Seller acting on behalf of and with the authority of the buyer.

“Guarantor” means that person (or persons), or entity who agrees herein to be liable for the debts

of the Buyer if a Limited Liability Buyer on a principal debtor basis.

“Goods” shall mean Goods supplied by the Seller to the Buyer (and where the context so permits shall include any supply of Services as hereinafter defined).

“Services” shall mean all services supplied by the Seller to the Buyer and includes any advice or recommendations (and where the context so permits shall include any supply of Services as defined supra).

“Price” shall mean the cost of the Goods as agreed between the Seller and the Buyer subject to clause 4 of this contract.

2. Acceptance

Any instructions received by the Seller from the Buyer for the supply of Goods and/or the Buyer’s acceptance of Services and/or Goods supplied by the Seller shall constitute acceptance of the terms and conditions contained herein.

Upon acceptance of these terms and conditions by the Buyer the terms and conditions are irrevocable and can only be rescinded in accordance with these terms and conditions or with the written consent of the manager of the Seller.

None of the Seller’s agents or representatives are authorised to make any representations, statements, conditions or agreements not expressed by the manager of the Seller in writing nor is the Seller bound by any such unauthorised statements.

3. Goods

The Goods shall be as described on the invoices, quotation, work authorisation, sales order or any other work commencement forms as provided by the Seller to the Buyer.

4. Price and Payment

At the Sellers sole discretion:

(a) the Price shall be the Seller’s current price at the date of delivery of the Goods according to the Sellers current Price list; or

(b) The Price shall be as indicated on invoices provided by the Seller to the Buyer in respect of Goods supplied; or

(c) The price of the Goods shall be the Seller’s quoted price, which shall be binding upon the Seller provided that the Buyer shall accept in writing the Seller’s quotation within thirty (30) days.

The Seller may be giving notice to the Buyer at any time up to seven (7) days before delivery increase the Price of the Goods to reflect any increase in the cost to the Seller beyond the reasonable control of the Seller, unless previous arrangements have been made.

At the Sellers sole discretion a deposit may be required. The deposit amount or percentage of the Price will be stipulated at the time of the order of the Goods/Services and shall become immediately due and payable.

Time for payment for the Goods/Services shall be of the essence and will be stated on the invoice, quotation or any other order forms. If no time is stated then payment shall be on delivery of the Goods/Service.

At the Seller’s sole discretion payment may be due at the date of this agreement. The Seller may withhold delivery of the Goods until the Buyer has paid for them, in which event payment shall be made before the delivery date.

At the Sellers sole discretion, for certain approved Buyers payment will be due thirty (30) days following the date of the invoice, unless previous arrangements have been made.

Payment will be made by cash on delivery, or by bank cheque, or by credit card or by any other method as agreed to between the Buyer and the Seller.

The Price shall be increased by the amount of any GST and other taxes and duties which may be applicable, except to the extent that such taxes are expressly included in any quotation given by the Seller.

5 **Goods and Services Tax**

For the purposes of this Clause unless the context requires:

1 "Act means the Act or Acts resulting from the enactment of A New Tax System (Goods and Services Tax) Act 1999 or any act substituted for amending or replacing that act or otherwise providing for any tax called "GST" or a "Goods and Services Tax" and any related Tax Imposition Act (whether imposing tax as a duty of Customs Excise or otherwise) and includes any legislation which is enacted to validate recapture or recoup the tax imposed by any of such Acts;

2 "GST" means any tax imposed by or through the Act on supply (without regard to any input tax credit);

3 "Supply" and "Taxable Supply" have the meanings given them in the Act.

If any GST or Goods and Services Tax or similar is payable, or becomes payable, on any Supply by the

Seller under an order, the Seller may recover from the Buyer the amount of such GST or similar tax in

Addition to and at the same time and in the same manner as the Buyer is obliged to pay for that

Supply.

The Seller will issue the Buyer with tax invoices in such a form as would enable the Buyer if

Entitled, to claim input tax credits in respect of Taxable Supply.

6 **Delivery of Goods/Services**

Delivery of the Goods shall be made to the Buyer's address. The Buyer shall make all arrangements necessary to take delivery of the Goods whenever they are tendered for delivery, or delivery of the Goods shall be made to the Buyer at the Sellers address.

Delivery of the Goods to a carrier, either named by the Buyer or failing such naming to a carrier at the discretion of the Seller for the purpose of transmission to the Buyer, is deemed to be a delivery of the Goods to the Buyer.

The costs of carriage and any insurance which the Buyer reasonably directs the Seller to incur shall be reimbursed by the Buyer (without any set-off or other withholding whatever) and shall be due on the date of payment of the Price. The carrier shall be deemed to be the Buyer's agent.

Where there is no agreement that the Seller shall send the Goods to the Buyer, delivery to a carrier at limited carrier's risk at the expense of the Buyer is deemed to be delivery to the Buyer.

Delivery of the Goods to a third party nominated by the Buyer is deemed to be delivery to the Buyer for the purposes of this agreement.

The failure of the Seller to deliver shall not entitle either party to treat this contract as repudiated.

The Seller shall not be liable for any loss or damage whatever due to failure by the Seller to deliver the Goods (or any of them) promptly or at all.

The Buyer shall take delivery of the Goods tendered notwithstanding that the quantity so delivered shall be either greater or less than the quantity purchased provided that:

(a) such discrepancy in quantity shall not exceed 5% and

(b) the Price shall be adjusted pro rata to the discrepancy

(c) Arrangements made by Buyers for FIS (Free Into Store) shall be maintained as per contracts.

7 **Transport**

The Seller offers to customers transport options, attracting competitive or discounted rates which are passed on for Buyers benefit. Any specific requirements for freight and packaging are to be made in writing and to be incorporated as part of any official order. Where a customer specifies a carrier other than the Seller's carrier, the customer shall be directly responsible for all

costs and charges and indemnifies the Seller against any charge by the Buyers nominated carrier. Unless previous arrangements have been agreed upon.

8 Risk

If the Seller retains property in the Goods nonetheless, all risk for the Goods passes to the Buyer on delivery.

9 Quality

The Seller will use its best endeavors to ensure that Products are propagated from reliable stock to accepted industry standards of quality and performance. Products will be graded and packed to reach the customer in the best possible condition in accordance with delivery requirements.

10 Defects

The Buyer shall inspect the Goods on delivery and shall within seven (7) days of delivery notify the Seller in writing of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Buyer shall afford the Seller an opportunity to inspect the Goods within a reasonable time following delivery. If the Buyer shall fail to comply with these provisions the Goods shall be conclusively presumed to be in accordance with the terms and conditions and free from any defect or damage.

11 Return of Goods

For defective Goods which the Seller has agreed in writing that the Buyer is entitled to reject, the Seller's liability is limited to either (at the Seller's discretion) replacing the Goods or replacing the Goods provided that:

- (a) the Buyer has complied with the provisions of clause 11;
- (b) the Goods are returned at the Buyers cost within seven (7) days of the delivery date;
- (c) the Seller will not be liable for Goods which have not been stored or used in a proper manner;
- (d) the Goods are returned in the condition in which they were delivered.

12 Non Propagation Agreement

As noted on Faceys Nursery Pty Ltd published price lists, various products are sold under License and/or protected by Plant Breeders Rights. Further propagation or hybridisation, or breeding from these products or from any plants or plant derived from them, supplies as part or all of any order is prohibited. Export of those products, except as cut flowers, is also prohibited. Any mutations or sports derived from these products supplied remain the exclusive property of its licensor and when observed shall be maintained by the customer and reported to the Seller within 14 days.

13 Warranty

For Goods not manufactured by the Seller, the warranty shall be the current warranty provided by the manufacturer of the Goods. The Seller shall be under no liability whatsoever except for the express conditions as detailed and stipulated in the manufacturers warranty.

14 The Commonwealth Trade Practices Act 1974 and Fair Trading Acts

Nothing in this agreement is intended to have the affect of contracting out of any applicable provisions of the Commonwealth Trade Practices Act 1974 or the Fair Trading Acts in each of the States and Territories of Australia, except to the extent permitted by those Acts where applicable.

15 Buyers Disclaimer

The Buyer hereby disclaims any right to rescind, or cancel the contract or to sue for damages or to claim restitution arising out of any misrepresentation made to him by any servant or agent of the Seller and the Buyer acknowledges that he buys the Goods relying solely upon his own skill and judgment and that the Seller shall not be bound by nor responsible for any term, condition, representation or warranty other than the warranty given by the Manufacturer which warranty shall be personal to the Buyer and shall not be transferable to any subsequent Buyer.

16 Default & Consequences of Default

If the Buyer defaults in payment of any invoice when due, the Buyer shall indemnify the Seller from and against all the Seller's costs and disbursements including on a solicitor and own client basis and in addition all costs of collection. 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 payments as they fall due: or
- (b) the Buyer becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors: or
- (c) 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 any part of any order of the Buyer which remains unperformed in addition to 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.

17 Title

It is the intention of the Seller and agreed by the Buyer that property in the goods shall not pass until the Buyer has paid all amounts owing for the particular Goods.

18 Cancellation

The Seller may cancel these terms and conditions or cancel delivery of Goods at any time before the Goods are delivered by giving written notice. The Seller shall not be liable for any loss or damage whatever arising from such cancellation. At the Seller's sole discretion the Buyer may cancel delivery of Goods and/or Services. In the event that the Buyer cancels delivery of Goods and/or Services the Buyer shall be liable for any costs incurred by the Seller up to the time of cancellation. Any requests for cancellation by the Buyer shall be made in writing to the Seller.

19 Privacy Act 1988

The Buyer and/or the Guarantor/s agree for the Seller to obtain from a credit-reporting agency a credit report containing personal credit information about the Buyer and Guarantor/s in relation to credit provided by the Seller.

The buyer and/or the Guarantor/s agree that the Seller may exchange information about Buyer and Guarantor/s with those credit providers named in the Application for Credit account or named in a consumer credit report issued by a reporting agency for the following purposes:

- (a) To assess an application by Buyer;
- (b) To notify other credit providers of a default by the Buyer;
- (c) To exchange information with other credit providers as to the status of this credit account, where the Buyer is in default with other credit providers; and
- (d) To assess the credit worthiness of Buyer and/or Guarantor/s.

The Buyer consents to the Seller being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(H) Privacy Act 1988).

The Buyer agrees that Personal Data provided may be used and retained by the Seller for the following purposes and for other purposes as shall be agreed between the Buyer and Seller or required by law from time to time:

- (a) provision of Services & Goods;
- (b) marketing of Services and or Goods by the Seller, its agents or distributors in relation to the Services and Goods;
- (c) analysing, verifying and/or checking the Buyer's credit, payment and/or status in relation to provision of Services/Goods;
- (d) processing of any payment instructions, direct debit facilities and/or credit facilities requested by Buyer; and
- (e) enabling the daily operation of Buyer's account and/or the collection of amounts outstanding in the Buyer's account in relation to the Services and Goods.

The Seller may give, information about the Buyer to a credit reporting agency for the following purposes:

- (a) to obtain a consumer credit report about the Buyer; and or
- (b) allow the credit reporting agency to create or maintain a credit information file containing information about the Buyer

20 Unpaid Seller Rights to Dispose of Goods

In the event that:

- (a) the Seller retains possession or control of the Goods; and
- (b) payment of the Price is due to the Seller; and
- (c) the Seller has made demand in writing of the Buyer for payment of the Price in terms of this contract; and
- (d) the Seller has not received the Price of the Goods,

then, whether the property in the Goods has passed to the Buyer or has remained with the Seller, the Seller may dispose of the Goods and may claim from the Buyer the loss to the Seller on such disposal.

21 General

If any provision of these terms and conditions shall be invalid, void or illegal or unenforceable the validity existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.

All Services/Goods supplied by the Seller are subject to the laws of Victoria and the Seller takes no responsibility for changes in the law which affect the Services/Goods supplied.

The Seller shall be under no liability whatever to the Buyer for any indirect loss and/or expense (including loss of profit) suffered by the Buyer arising out of a breach by the Seller of these terms and conditions.

In the event of any breach of this contract by the Seller the remedies of the Buyer shall be limited to damages. Under no circumstances shall the liability of the Seller exceed the Price of the Goods.

The Buyer shall not set off against the Price amounts due from the Seller.

The Seller may license or sub-contract all or any part of its rights and obligations without the Buyer's consent.

The Seller reserves the right to review these terms and conditions at any time and from time to time.

If, following any such review, there is to be any change in such terms and conditions, that change will take effect from the date on which the seller notifies the Buyer of such change.

Neither party shall be liable for any default due to any act of God, war, strike, lock out, industrial action, fire, flood, drought, storm or other event beyond the reasonable control of either party.