

GENESIS NURSERIES LIMITED
Terms and Conditions of Sale

1 Definitions

Unless the context otherwise requires:

"Agreement" means the Order Request and these Terms.

"Base Cost" means the estimated purchase price of the Plant Materials as specified in the Order Request.

"Customer" means the person purchasing the Plant Materials pursuant to this Agreement, including the Customer's permitted successors and assigns.

"Delivery Date" means the estimated delivery date specified by Genesis Nurseries to the Customer.

"Event of Default" means an event where the Customer:

- (a) fails to comply with the terms of this Agreement or any other agreement with us;
- (b) commits an act of bankruptcy;
- (c) enters into any composition or arrangement with its creditors; or
- (d) is a company and goes into liquidation, statutory management, receivership or voluntary administration or is otherwise dissolved (other than for the purposes of a solvent reconstruction) or is subject to any analogous event.

"GST" means goods and services tax pursuant to the Goods and Services Tax Act 1985 (as amended or replaced).

"Licensor" means a party providing the right to use certain Intellectual Property related to the Plant Materials to Genesis Nurseries under a licence however that may be described or defined.

"Genesis Nurseries" means Genesis Nurseries Limited together with its successors and assigns.

"ownership" means the property in and legal and beneficial ownership.

"Order Request" means the order form for Plant Materials generated on the Website and submitted to Genesis Nurseries.

"person" includes a corporation, association, firm, company, partnership or individual.

"Plant Materials" means the root stock, trees, dormant buds or any other plant material of any cultivar supplied under any agreement.

"PPSA" means the Personal Property Securities Act 1999.

"Terms" means these Terms of Trade as replaced or amended from time to time as advised by Genesis Nurseries.

"Use Agreement" means either a Grower Agreement, Non-Propagation Agreement or Test Agreement, as applicable depending on the intended use of the plant material by the Customer, in the form required by Genesis Nurseries.

"Website" means www.Genesisnurseries.co.nz

2 Sale and Purchase of Plant Materials

- 2.1 Genesis Nurseries agrees to sell and the Customer agrees to buy the Plant Material for the Purchase Price on the terms and conditions set out in this Agreement.

- 2.2 The Customer acknowledges and agrees that Genesis Nurseries may at its absolute discretion use third party growers to produce the Plant Materials.

3 Agreement conditional

- 3.1 Each Order Request must be confirmed in writing by Genesis Nurseries.

- 3.2 The Agreement is conditional upon the Customer signing and returning to Genesis Nurseries:

- (a) the relevant Use Agreement; and
- (b) if required by Genesis Nurseries, a guarantee from the individual or individuals who control the Customer in the form required by Genesis Nurseries,

within 14 days of Genesis Nurseries confirming the Order Request. If these conditions are not satisfied within this timeframe, either party may cancel this Agreement by notice in writing to the other, with immediate effect.

- 3.3 Once the conditions in clause 3.2 are confirmed, the order set out in the Order Request and this Agreement may not be cancelled or terminated by the Customer.

4 Price

- 4.1 The price of the Plant Material is the Base Cost, adjusted to reflect any increase in the costs associated with producing, cultivating and supplying the Plant Materials to the Customer (the **"Purchase Price"**).

- 4.2 The final Purchase Price will be notified by Genesis Nurseries to the Customer by way of invoice prior to the due date for the final payment under clause 5.1 and is payable in accordance with clause 5.

- 4.3 Unless otherwise agreed in writing prices are given in New Zealand dollars and do not include GST, insurance or delivery costs.

5 Payment

- 5.1 Unless otherwise agreed in writing the Customer must pay for the Plant Materials as follows:

- (a) 10% excluding GST of the Base Cost on confirmation of the Order Request by Genesis Nurseries;
- (b) 20% excluding GST of the Base Cost on the 20th November 2 years prior to the year of deliver as specified in the Order Request;
- (c) 20% excluding GST of the Base Cost on the 20th July in the year prior to the year of delivery as specified in the Order Request; and
- (d) the balance not less than 14 days prior to the Delivery Date.

- 5.2 All amounts paid to Genesis Nurseries are non-refundable.

- 5.3 If the Customer fails to pay any amount owing in accordance with 5.1 above, Genesis Nurseries may, at it's option, cancel or withhold the supply of the Plant Materials.

- 5.4 Without prejudice to any other remedies available to Genesis Nurseries, in the event that payment is not

received by the date it is due, Genesis Nurseries may charge default interest on monies overdue at rate of 2.5% per month which will accrue on a daily basis until all amounts due, including default interest, have been paid in full. All amounts received by Genesis Nurseries will be applied first in payment of default interest.

- 5.5 All costs incurred by Genesis Nurseries in recovering overdue monies (including court, solicitor and debt collection costs) are payable by the Customer.
- 5.6 The Customer must pay the full amount owing under these Terms free of all deductions or rights of set off.

6 Delivery and Risk

- 6.1 Plant Material will be despatched for delivery to the Customer between the months of June and September each year.
- 6.2 Genesis Nurseries will arrange for the transportation of the Plant Materials to the Customer's nominated place of delivery however the Customer shall be responsible for the cost of transportation of the Plant Materials.
- 6.3 The Delivery Date or any other delivery date notified to the Customer is approximate only and the Customer is not entitled to cancel any order for, or to refuse delivery of, the Plant Materials due to any delay.
- 6.4 Risk in respect of the Plant Materials shall pass to the Customer at the time the Plant Materials are loaded onto the carrier arranged by Genesis Nurseries for transport to the Customer.
- 6.5 Genesis Nurseries will not be liable to the Customer for any loss or damage arising in any way from any delay in delivery.

7 Title

- 7.1 Ownership of the Plant Materials remains with Genesis Nurseries and does not pass to the Customer until Genesis Nurseries receives full payment of all amounts due and payable from the Customer excluding any production royalty payments under a Use Agreement and the Customer has satisfied all of its obligations to Genesis Nurseries under this Agreement. Until all amounts owing to Genesis Nurseries have been paid, the following shall apply:
 - (a) the Customer will hold or deal with the Plant Materials as a fiduciary of Genesis Nurseries and deal with it as agent and on behalf of Genesis Nurseries (but the Customer will not hold itself out to be Genesis Nurseries' agent to any third parties);
 - (b) the Customer will keep the Plant Materials separate from other goods or otherwise ensure that the Plant Materials are separately identified or identifiable; and
 - (c) the Customer must not grant any interest or charge over the Plant Materials to any person.
- 7.2 The Customer will not assign or purport to assign to any other person the right to receive any such proceeds held or owing to the Customer by a third party in respect of the Plant.

- 7.3 The Customer grants Genesis Nurseries an irrevocable licence to take any action it considers necessary at any time to protect the Goods or its security interest in the Plant Materials (including, without limitation, taking possession of the Plant Materials at any time without notice and entering onto the land and premises where the Plant Materials are, regardless of whether or not an occupier is present, and repossessing the Plant Materials) without incurring any liability to the Customer or (to the extent permitted by law) any other person. To the extent permitted by law, Genesis Nurseries will not be liable to the Customer or any third party for any loss or damage caused by its actions under this clause and the Customer indemnifies the Genesis Nurseries, its servants and agents, for any alleged liability resulting from the repossession, and the Customer will pay all costs incurred by Genesis Nurseries in respect of the repossession.

8 Security

- 8.1 Without limiting anything else in these Terms, the Customer grants to Genesis Nurseries a security interest in the Plant Materials and all fruit resulting from such Plant Materials (together with all proceeds) so as to secure all monies owing by the Customer to Genesis Nurseries. The Customer agrees to do all things necessary to enable Genesis Nurseries to register a financing statement on the Personal Property Securities Register (PPSR) and to ensure that the security interest is a first ranking perfected security interest over all the Plant Materials, resulting fruit and proceeds.
- 8.2 If the Goods subsequently become part of some other product or mass, then nothing in these Terms shall limit the application of sections 82 to 86 of the PPSA.
- 8.3 The Customer waives its right to receive a copy of any verification statement in respect of any financing statement or financing change statement relating to the security interest.
- 8.4 The Customer agrees that nothing in sections 114(1)(a), 120(1), 122, 133 or 134 of the PPSA will apply. The Customer agrees to waive its rights as a debtor under sections 116, 120(2), 121, 125, 126, 127, 129 and 131 of the PPSA to the extent that these rights may be waived under section 107(2) of the PPSA.
- 8.5 The parties also agree that this Agreement constitutes an agreement to mortgage all properties owned by the Customer from time to time where Plant Materials are planted in favour of Genesis Nurseries, on the terms and conditions contained in mortgage memorandum number 2015/4328. Notwithstanding that this Agreement does not specify the address of the property or properties owned by the Customer, Genesis Nurseries may register a caveat over any property owned by the Customer to protect its equitable rights under this Agreement.

9 Intellectual property

- 9.1 The Customer acknowledges that any and all intellectual property rights used or embodied in or in connection with the Plant Materials are and remain the sole property of

Genesis Nurseries or the Licensors (as applicable). The Customer agrees that the Customer will not during or at any time after the expiry or termination of this Agreement in any way question or dispute the ownership by Genesis Nurseries or the Licensors (as applicable) of such rights. Further the Customer will not do anything, and will do all things necessary to ensure no third party (including any party to whom the Customer sells resultant crop) does anything, inconsistent with Genesis Nurseries or the Licensors' (as applicable) rights, including planting resultant crop for producing further crops or anything similar.

9.2 The Customer must immediately notify Genesis Nurseries in writing of any breach of intellectual property rights in connection with the Plant Materials that it becomes aware of.

9.3 Clauses 9.1 and 9.2 confer benefits on and are enforceable by Genesis Nurseries and each Licensor, including, without limitation, Global Plant Variety Administration Limited and Genesis Licence Varieties Limited, including for the purposes of the contracts privity provisions of the Contracts and Commercial Law Act 2017.

10 Limitation of Liability

10.1 Except to the extent of any written warranties given by Genesis Nurseries to the Customer, all warranties and representations, including those expressed or implied by law, are excluded to the extent permitted by law.

10.2 To the fullest extent permitted by law, Genesis Nurseries (including its directors, employees, contractors and agents) shall not be liable:

- (a) for loss caused by any factors beyond Genesis Nurseries' reasonable control, including any act of God;
- (b) failure of the Plant Material to produce fruit or to produce fruit of a certain appearance or quality;
- (c) where the Customer has treated or used the Plant Materials otherwise than in accordance with the Use Agreement or Genesis Nurseries' recommendations;
- (d) for any delay in delivery or replacement of the Plant Materials;
- (e) any loss of or damage to Plant Materials that occurs while the Plant Materials are being transported to the Customer;
- (f) for any indirect or consequential loss of any kind including, without limitation, loss of profits.

10.3 Without limiting clause 10.2, Genesis Nurseries' total liability for defective or damaged Plant Material supplied by the Genesis Nurseries or otherwise arising under this Agreement is limited at Genesis Nurseries' option to either:

- (a) replacing the Plant Materials; or
- (b) refunding the price of the Plant Materials.

10.4 The Customer must notify the Genesis Nurseries within 48 hours of delivery of the Plant Materials of any complaint the Customer may have in respect of the Plant Materials. Genesis Nurseries will not be liable for any defective or damaged Plant Materials unless notification is given within this time period.

10.5 Without limiting any other provision of these Terms, the Customer acknowledges and agrees that the description under which the Plant Materials are sold represents no more than what Genesis Nurseries reasonably believes the Plant Materials to be and does not constitute a guarantee or warranty that any fruit resulting from the Plant Materials will grow true to that description. Genesis Nurseries gives no warranties in respect to the description, growth, quality, palatability, toxicity or purity of the Plant Materials and will not be responsible for any unexpected or adverse results.

11 Indemnity

The Customer agrees to indemnify Genesis Nurseries against any liability or cost incurred by Genesis Nurseries as a result of the Customer breaching any of the obligations contained in this Agreement or the Use Agreement.

12 Information

12.1 The Customer (and any guarantor) authorises Genesis Nurseries to collect, retain and use information provided by the Customer for the purpose of carrying out credit checks, deciding whether to continue to make any goods or services available to the Customer, debt collection or marketing.

12.2 The Customer authorises Genesis Nurseries to obtain credit reports and other information about the Customer from any third party for this purpose.

12.3 You also authorise Genesis Nurseries to provide information about the Customer (including information relating to any default in the Customer's payment obligations) to any third party for the purpose of that party carrying out credit checks, obtaining credit reports or debt collection. To the extent permitted by law those third parties may hold that information in their systems and use it now and in the future.

12.4 The Customer may ask to see any personal information Genesis Nurseries holds about it and ask for any details that are wrong to be corrected.

13 Consumer Guarantees Act and Fair Trading Act

Where the Customer is acquiring the Plant Materials for business purposes, the parties agree that:

- (a) the Consumer Guarantees Act 1993; and
- (b) sections 9, 12A, 13 and 14(1) of the Fair Trading Act 1986,

do not apply to this Agreement.

14 Sale of Goods

To the extent permitted by law, none of the Contract and Commercial Law Act 2017, the United Nations Convention on Contracts for the International Sale of Goods (1980) or the Sale of Goods (United Nations Convention) Act 1994 apply to this Agreement.

15 Cancellation

15.1 The Customer may not cancel all or part of an Order Request without Genesis Nurseries' written consent (which

may be withheld at its discretion). If the Customer does cancel any order of Plant Materials, in addition to any other rights Genesis Nurseries may have, Genesis Nurseries is entitled to retain all deposit amounts paid.

- 15.2 Genesis Nurseries may cancel an order or delivery of an order by giving written notice to the Customer if:
- (a) the Customer commits a breach of the Agreement or Use Agreement that is incapable of remedy;
 - (b) the Customer has failed to comply with a written notice given by Genesis Nurseries specifying a breach of the Agreement and requiring the Customer to remedy the breach within 14 days;
 - (c) an Event of Default occurs in relation to the Customer.
- 15.3 On termination Genesis Nurseries shall have the right to deal with the Plant Materials as Genesis Nurseries wishes at its absolute discretion.

16 General

- 16.1 If there is any dispute between the parties in respect to the interpretation and/or performance of this Agreement then the parties shall attempt to resolve the dispute in good faith and failing resolution, by mediation. The mediator is to be agreed by Genesis Nurseries and the Customer who shall be responsible for the costs of the mediation in equal shares.
- 16.2 Any amendment to this Agreement must be recorded in writing.
- 16.3 A reference to any legislation in this Agreement includes a reference to any amended or substitute legislation and any regulations enacted under that legislation.
- 16.4 This Agreement is subject to, governed by and interpreted in accordance with New Zealand law and the parties submit to the exclusive jurisdiction of the courts of New Zealand in respect of any dispute in relation to this Agreement.
- 16.5 Each clause of this Agreement is separately binding. If any clause is void, unenforceable or otherwise ineffective by operation of New Zealand law the remaining clauses will continue to be valid and enforceable.
- 16.6 Where the Customer comprises more than one person or entity then the obligations between those persons under this Agreement are joint and several.
- 16.7 The Customer shall not assign or subcontract any rights or obligations under this Agreement without the prior written consent of Genesis Nurseries, which may be given or withheld in Genesis Nurseries' sole discretion.
- 16.8 This Agreement may be entered into in counterparts (including electronic copies) which when taken together will constitute one Agreement.