

WAIMEA NURSERIES LTD – TERMS & CONDITIONS OF TRADE

1. **Definitions**
- 1.1 "Waimea Nurseries" means Waimea Nurseries Ltd, its successors and assigns or any person acting on behalf of and with the authority of Waimea Nurseries Ltd.
- 1.2 "Client" means the person or any person acting on behalf of and with the authority of the Client requesting Waimea Nurseries to provide the Services as specified in any proposal, quotation, order, invoice or other documentation, and:
 - (a) if there is more than one Client, is a reference to each Client jointly and severally; and
 - (b) if the Client is a part of a Trust, shall be bound in their capacity as a trustee; and
 - (c) includes the Client's executors, administrators, successors and permitted assigns.
- 1.3 "Goods" means all Goods or Services supplied by Waimea Nurseries to the Client at the Client's request from time to time (where the context so permits the terms 'Goods' or 'Services' shall be interchangeable for the other).
- 1.4 "Price" means the Price payable (plus any Goods and Services Tax ("GST") where applicable) for the Goods as agreed between Waimea Nurseries and the Client in accordance with clause 6 below.
- 1.5 "Finished Product" shall mean any plant product sold in the form it is used by the ultimate consumer, including without limitation the flower, stem and leaves. Finished Product does not include "Plant Materials".
- 1.6 "Plant Material" shall mean any portion of a plant, or parts thereof, including without limitation, a blossom, spray, potted plant or cutting, which is or may be usable, during a particular part of a plant's growth cycle to asexually reproduce a plant.
2. **Acceptance**
- 2.1 The Client is taken to have exclusively accepted and is immediately bound, jointly and severally, by these terms and conditions if the Client places an order or accepts delivery of the Goods.
- 2.2 These terms and conditions may only be amended with the consent of both parties in writing and shall prevail to the extent of any inconsistency with any other document or contract between the Client and Waimea Nurseries.
- 2.3 The Client acknowledges that the supply of Goods and/or Services on credit shall not take effect until the Client has completed a credit application with Waimea Nurseries and it has been approved with a credit limit established for the account.
- 2.4 In the event that the supply of Goods and/or Services request exceeds the Client's credit limit and/or the account exceeds the payment terms, Waimea Nurseries reserves the right to refuse delivery. No credit will be extended to overdue accounts, at the Seller's discretion trading will then be subject to COD, until such time as the Client's credit account is brought back into line and paid to date within the established credit limit or by mutual agreement the credit limit is increased.
- 2.5 Electronic signatures shall be deemed to be accepted by either party providing that the parties have complied with Section 22 of the Electronic Transactions Act 2002 or any other applicable provisions of that Act or any Regulations referred to in that Act.
- 2.6 These terms and conditions may be meant to be read in conjunction with Waimea Nurseries Supply Agreement, and:
 - (a) where the context so permits, the terms 'Goods' and 'Services', as defined therein; and
 - (b) if there are any inconsistencies between the two documents then the terms and conditions contained therein shall prevail.
3. **Non-Propagation Agreement**
- 3.1 The Client agrees and acknowledges that plant varieties sold by Waimea Nurseries are purchased solely for purpose of producing fruit and that propagation of these varieties is strictly prohibited and that heavy penalties apply on un-authorised propagation.
- 3.2 The Client further acknowledges agrees that:
 - (a) that the Client shall not sell, lease, lend or give away varieties protected by this agreement; and
 - (b) to notify Waimea Nurseries should any mutations occur.
4. **Errors and Omissions**
- 4.1 The Client acknowledges and accepts that Waimea Nurseries shall, without prejudice, accept no liability in respect of any alleged or actual error(s) and/or omission(s):
 - (a) resulting from an inadvertent mistake made by Waimea Nurseries in the formation and/or administration of this contract; and/or
 - (b) contained in/omitted from any literature (hard copy and/or electronic) supplied by Waimea Nurseries in respect of the Services.
- 4.2 In the event such an error and/or omission occurs in accordance with clause 4.1, and is not attributable to the negligence and/or willful misconduct of Waimea Nurseries; the Client shall not be entitled to treat this contract as repudiated nor render it invalid.
5. **Change in Control**
- 5.1 The Client shall give Waimea Nurseries not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client and/or any other change in the Client's details (including but not limited to, changes in the Client's name, address and contact phone or fax number/s, change of trustees or business practice). The Client shall be liable for any loss incurred by Waimea Nurseries as a result of the Client's failure to comply with this clause.
6. **Price and Payment**
- 6.1 At Waimea Nurseries sole discretion the Price shall be either:
 - (a) as indicated on any invoice provided by Waimea Nurseries to the Client; or
 - (b) the Price as at the date of delivery of the Goods according to Waimea Nurseries current price list; or
 - (c) Waimea Nurseries quoted price (subject to clause 6.2) which will be valid for the period stated in the quotation or otherwise for a period of thirty (30) days.
- 6.2 Waimea Nurseries reserves the right to change the Price:
 - (a) if a variation to the Goods and/or Services which are to be supplied is requested; or
 - (b) in the event of increases to Waimea Nurseries in the cost of labour or materials (including but not limited to overseas transactions that may increase as a consequence of variations in foreign currency rates of exchange and/or international freight and insurance charges) which are beyond Waimea Nurseries control.
- 6.3 Variations will be charged for on the basis of Waimea Nurseries quotation, and will be detailed in writing, and shown as variations on Waimea Nurseries invoice. The Client shall be required to respond to any variation submitted by Waimea Nurseries within ten (10) working days. Failure to do so will entitle Waimea Nurseries to add the cost of the variation to the Price. Payment for all variations must be made in full at the time of their completion.
- 6.4 At Waimea Nurseries sole discretion a non-refundable deposit may be required.
- 6.5 Time for payment for the Goods being of the essence, the Price will be payable by the Client on the date/s determined by Waimea Nurseries, which may be:
 - (a) on delivery of the Goods;
 - (b) before delivery of the Goods;
 - (c) by way of instalments/progress payments in accordance with Waimea Nurseries payment schedule;
 - (d) for certain approved Clients, due twenty (20) days following the end of the month in which a statement is posted to the Client's address or address for notices;
 - (e) the date specified on any invoice or other form as being the date for payment; or
 - (f) failing any notice to the contrary, the date which is seven (7) days following the date of any invoice given to the Client by Waimea Nurseries.
- 6.6 Unless otherwise stated, a trade discount shall be included in the quoted Price; however such discount shall become null and void, if payment is not made by the due date stated on the invoice and/or statement. In such an event of late payment Waimea Nurseries reserves the right to vary the Price where any discounts or special prices are revoked.
- 6.7 Payment may be made by cheque, bank cheque, electronic/on-line banking, credit card-No Amex or Diners (a surcharge per transaction may apply), or by any other method as agreed between the Client and Waimea Nurseries.
- 6.8 The Client shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Client by Waimea Nurseries nor to withhold payment of any invoice because part of that invoice is in dispute.
- 6.9 Any royalty charges, if applicable, are additional to the tree Price and are exclusive of GST.
- 6.10 Unless otherwise stated the Price does not include GST. In addition to the Price, the Client must pay to Waimea Nurseries an amount equal to any GST Waimea Nurseries must pay for any supply by Waimea Nurseries under this or any other contract for the sale of the Goods. The Client must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Client pays the Price. In addition, the Client must pay any other taxes and duties that may be applicable in addition to the Price except where they are expressly included in the Price.
7. **Delivery of Goods**
- 7.1 Delivery ("Delivery") of the Goods is taken to occur at the time that:
 - (a) the Client or the Client's nominated carrier takes possession of the Goods at Waimea Nurseries address; or
 - (b) Waimea Nurseries (or Waimea Nurseries nominated carrier) delivers the Goods to the Client's nominated address even if the Client is not present at the address.
- 7.2 At Waimea Nurseries sole discretion the cost of delivery is either included in the Price or is in addition to the Price.
- 7.3 Any time specified by Waimea Nurseries for delivery of the Goods is an estimate only. The Client must take delivery by receipt of collection of the Goods however they are tendered for delivery. Waimea Nurseries will not be liable for any loss or damage incurred by the Client as a result of delivery being late. In the event that the Client is unable to take delivery of the Goods as arranged then Waimea Nurseries shall be entitled to charge a reasonable fee for redelivery and/or storage.
- 7.4 Waimea Nurseries may deliver the Goods in separate instalments. Each separate instalment shall be invoiced and paid in accordance with the provisions in these terms and conditions.
- 7.5 The failure of Waimea Nurseries to deliver shall not entitle either party to treat this contract as repudiated.
8. **Risk**
- 8.1 Risk of damage to or loss of the Goods passes to the Client on Delivery and the Client must insure the Goods on or before Delivery.
- 8.2 If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Client, Waimea Nurseries is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by Waimea Nurseries is sufficient evidence of Waimea Nurseries rights to receive the insurance proceeds without the need for any person dealing with Waimea Nurseries to make further enquiries.
- 8.3 In the event that the contract, sales order, commercial order relates to the sale of Dominant Buds then the Client accepts responsibility for the establishment of the Goods to full term trees and Waimea Nurseries accepts no liability for any losses resulting from the supply and establishment of the Goods. Waimea Nurseries gives no warranty or guarantee as to performance in respect of Dominant Buds and will not be responsible for or be under any obligation to replace any bud failures.
9. **Title**
- 9.1 Waimea Nurseries and the Client agree that ownership of the Goods shall not pass until:
 - (a) the Client has paid Waimea Nurseries all amounts owing to Waimea Nurseries; and
 - (b) the Client has met all of its other obligations to Waimea Nurseries.
- 9.2 Receipt by Waimea Nurseries of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised.
- 9.3 It is further agreed that until ownership of the Goods passes to the Client in accordance with clause 9.1:
 - (a) the Client is only a bailee of the Goods and must return the Goods to Waimea Nurseries on request.
 - (b) the Client holds the benefit of the Client's insurance of the Goods on trust for Waimea Nurseries and must pay to Waimea Nurseries the proceeds of any insurance in the event of the Goods being lost, damaged or destroyed.
 - (c) the Client must not sell, dispose, or otherwise part with possession of the Goods other than in the ordinary course of business and for market value. If the Client sells, disposes or parts with possession of the Goods then the Client must hold the proceeds of any such act on trust for Waimea Nurseries and must pay or deliver the proceeds to Waimea Nurseries on demand.
 - (d) the Client shall not convert or process the Goods or intermix them with other goods but if the Client does so then the Client holds the resulting product on trust for the benefit of Waimea Nurseries and must sell, dispose of or return the resulting product to Waimea Nurseries as it so directs.
 - (e) the Client irrevocably authorises Waimea Nurseries to enter any premises where Waimea Nurseries believes the Goods are kept and recover possession of the Goods.
 - (f) Waimea Nurseries may recover possession of any Goods in Transit whether or not delivery has occurred.
 - (g) Waimea Nurseries may commence proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods has not passed to the Client.
10. **Personal Property Securities Act 1999 ("PPSA")**
- 10.1 Upon assenting to these terms and conditions in writing the Client acknowledges and agrees that:
 - (a) these terms and conditions constitute a security agreement for the purposes of the PPSA; and
 - (b) a security interest is taken in all Goods and/or collateral (account) – being a monetary obligation in relation to the Goods and/or collateral (account) – that have previously been supplied and that will be supplied in the future by Waimea Nurseries to the Client.
- 10.2 The Client undertakes to:
 - (a) sign any further documents and/or provide any further information (such information to be complete, accurate and up-to-date in all respects) which Waimea Nurseries may reasonably require to register a financing statement or financing charge statement on the Personal Property Securities Register;
 - (b) indemnify, and upon demand reimburse, Waimea Nurseries for all expenses incurred in registering a financing statement or financing charge statement on the Personal Property Securities Register or releasing any Goods charged thereby;
 - (c) not register, or permit to be registered, a financing statement or a financing charge statement in relation to the Goods and/or collateral (account) in favour of a third party without the prior written consent of Waimea Nurseries; and
 - (d) immediately advise Waimea Nurseries of any material change in its business practices of selling the Goods which would result in a change in the nature of proceeds derived from such sales.
- 10.3 Waimea Nurseries and the Client agree that nothing in sections 114(1)(a), 133 and 134 of the PPSA shall apply to these terms and conditions.
- 10.4 The Client waives its rights as a debtor under sections 116, 120(2), 121, 125, 126, 127, 129, 131 and 132 of the PPSA.
- 10.5 Unless otherwise agreed to in writing by Waimea Nurseries, the Client waives its right to receive a verification statement in accordance with section 148 of the PPSA.
- 10.6 The Client shall unconditionally ratify any actions taken by Waimea Nurseries under clauses 10.1 to 10.5.
11. **Security and Charge**
- 11.1 In consideration of Waimea Nurseries agreeing to supply the Goods, the Client charges all of its rights, title and interest (whether joint or several) in any land, realty or other assets capable of being charged, owned by the Client either now or in the future, to secure the performance by the Client of its obligations under these terms and conditions (including, but not limited to, the payment of any money).
- 11.2 The Client indemnifies Waimea Nurseries from and against all Waimea Nurseries costs and disbursements (including legal costs) on a solicitor and own client basis incurred in exercising Waimea Nurseries rights under this clause.
- 11.3 The Client irrevocably appoints Waimea Nurseries and each director of Waimea Nurseries as the Client's true and lawful attorney/s to perform all necessary acts to give effect to the provisions of this clause 11 including, but not limited to, signing any document on the Client's behalf.
12. **Defects and Returns**
- 12.1 The Client shall inspect the Goods on delivery and shall within seven (7) days of delivery (time being of the essence) notify Waimea Nurseries of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Client shall afford Waimea Nurseries an opportunity to inspect the Goods within a reasonable time following delivery if the Client believes the Goods are defective in any way. If the Client shall fail to comply with these provisions the Goods shall be presumed to be free from any defect or damage. For defective Goods, which Waimea Nurseries has agreed in writing that the Client is entitled to reject, Waimea Nurseries liability is limited to either (at Waimea Nurseries discretion) replacing the Goods or repairing the Goods.
- 12.2 Goods will not be accepted for return other than in accordance with 12.1 above, and provided that:
 - (a) Waimea Nurseries has agreed in writing to accept the return of the Goods; and
 - (b) the Goods are returned at the Client's cost within seven (7) days of the delivery date; and
 - (c) Waimea Nurseries will not be liable for Goods which have not been stored or used in a proper manner; and
 - (d) the Goods are returned in the condition in which they were delivered and with all packaging material, brochures and instruction material in as new condition as is reasonably possible in the circumstances.
- 12.3 Waimea Nurseries will not accept the return of Goods for credit.
- 12.4 Subject to clause 12.1, non-stocklist items or Goods made to the Client's specifications are not acceptable for credit or return.
13. **Disclaimer**
- 13.1 Neither Waimea Nurseries will take all due care to ensure all trees, plants, and propagation material sold by Waimea Nurseries to be true to name and description but any express or implied condition, statement of warranty whether arising by statute or common law or otherwise as to merchantable quality or name or description is hereby excluded.
14. **Consumer Guarantees Act 1993**
- 14.1 If the Client is acquiring Goods for the purposes of a trade or business, the Client acknowledges that the provisions of the Consumer Guarantees Act 1993 do not apply to the supply of Goods by Waimea Nurseries to the Client.
15. **Default and Consequences of Default**
- 15.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and a half percent (2.5%) per calendar month (and at Waimea Nurseries sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
- 15.2 If the Client owes Waimea Nurseries any money the Client shall indemnify Waimea Nurseries from and against all costs and disbursements incurred by Waimea Nurseries in recovering the debt (including but not limited to internal administration fees, legal costs on a solicitor and own client basis, Waimea Nurseries collection agency costs, and bank disbursement fees).
- 15.3 Further to any other rights or remedies Waimea Nurseries may have under this contract, if a Client has made payment to Waimea Nurseries, and the transaction is subsequently reversed, the Client shall be liable for the amount of the reversed transaction, in addition to any further costs recovered by Waimea Nurseries under this clause 15 where it can be proven that such reversal is found to be illegal, fraudulent or in contravention to the Client's obligations under this contract.
- 15.4 Without prejudice to Waimea Nurseries other remedies at law Waimea Nurseries shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to Waimea Nurseries shall, whether or not due for payment, become immediately payable if:
 - (a) any money payable to Waimea Nurseries becomes overdue, or in Waimea Nurseries opinion the Client will be unable to make a payment when it falls due;
 - (b) the Client has exceeded any applicable credit limit provided by Waimea Nurseries;
 - (c) the Client 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
 - (d) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.
16. **Cancellation**
- 16.1 Without prejudice to any other remedies Waimea Nurseries may have, if at any time the Client is in breach of any obligation (including those relating to payment) under these terms and conditions Waimea Nurseries may suspend or terminate the supply of Goods to the Client. Waimea Nurseries will not be liable to the Client for any loss or damage the Client suffers because Waimea Nurseries has exercised its rights under this clause.
- 16.2 Waimea Nurseries may cancel any contract to which these terms and conditions apply or cancel delivery of Goods at any time before the Goods are delivered by giving written notice to the Client. On giving such notice Waimea Nurseries shall repay to the Client any money paid by the Client for the Goods. Waimea Nurseries shall not be liable for any loss or damage whatsoever arising from such cancellation.
- 16.3 In the event that the Client cancels delivery of Goods the Client shall be liable for any and all loss incurred (whether direct or indirect) by Waimea Nurseries as a direct result of the cancellation (including, but not limited to, any loss of profits).
- 16.4 Cancellation of orders for Goods made to the Client's specifications, or for non-stocklist items, will definitely not be accepted once production has commenced, or an order has been placed.
17. **Privacy Act 1993**
- 17.1 The Client authorises Waimea Nurseries or Waimea Nurseries agent to:
 - (a) access, collect, retain and use any information about the Client;
 - (i) (including any overdue fines balance information held by the Ministry of Justice)
 - (ii) for the purpose of assessing the Client's creditworthiness; or
 - (iii) for the purpose of marketing products and services to the Client.
 - (b) disclose information about the Client, whether collected by Waimea Nurseries from the Client directly or obtained by Waimea Nurseries from any other source, to any other credit provider or any credit reporting agency for the purposes of providing or obtaining a credit reference, debt collection or notifying a default by the Client.
- 17.2 Where the Client is an individual the authorities under clause 17.1 are authorities or consents for the purposes of the Privacy Act 1993.
- 17.3 The Client shall have the right to request Waimea Nurseries for a copy of the information about the Client retained by Waimea Nurseries and the right to request Waimea Nurseries to correct any incorrect information about the Client held by Waimea Nurseries.
18. **Service of Notices**
- 18.1 Any written notice given under this contract shall be deemed to have been given and received:
 - (a) by handing the notice to the other party, in person;
 - (b) by leaving it at the address of the other party as stated in this contract;
 - (c) by sending it by registered post to the address of the other party as stated in this contract;
 - (d) if sent by facsimile transmission to the fax number of the other party as stated in this contract (if any), on receipt of confirmation of the transmission;
 - (e) if sent by email to the other party's last known email address.
- 18.2 Any notice that is posted shall be deemed to have been served, unless the contrary is shown, at the time when by the ordinary course of post, the notice would have been delivered.
19. **Trusts**
- 19.1 If the Client at any time upon or subsequent to entering into the contract is acting in the capacity of trustee of any Trust ("Trust") then whether or not Waimea Nurseries may have notice of the Trust, the Client covenants with Waimea Nurseries as follows:
 - (a) the contract extends to all rights of indemnity which the Client now or subsequently may have against the Trust and the trust fund;
 - (b) the Client has full and complete power and authority under the Trust to enter into the contract and the provisions of the Trust do not purport to exclude or take away the right of indemnity of the Client against the Trust or the trust fund. The Client will not release the right of indemnity or commit any breach of trust or be a party to any other action which might prejudice that right of indemnity.
 - (c) the Client will not without consent in writing of Waimea Nurseries (Waimea Nurseries will not unreasonably withhold consent), cause, permit, or suffer to happen any of the following events:
 - (i) the removal, replacement or retirement of the Client as trustee of the Trust;
 - (ii) any alteration to or variation of the terms of the Trust;
 - (iii) any advancement or distribution of capital of the Trust; or
 - (iv) any resettlement of the trust property.
20. **General**
- 20.1 The failure by either party to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect that party's right to subsequently enforce that provision. If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
- 20.2 These terms and conditions and any contract to which they apply shall be governed by the laws of New Zealand and are subject to the jurisdiction of the Nelson Courts of New Zealand.
- 20.3 Waimea Nurseries shall be under no liability whatsoever to the Client for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by Waimea Nurseries of these terms and conditions (alternatively Waimea Nurseries liability shall be limited to damages which under no circumstances shall exceed the Price of the Goods).
- 20.4 Waimea Nurseries may licence and/or assign all or any part of its rights and/or obligations under this contract without the Client's consent.
- 20.5 The Client cannot licence or assign without the written approval of Waimea Nurseries.
- 20.6 Waimea Nurseries may elect to subcontract out any part of the Services but shall not be relieved from any liability or obligation under this contract by so doing. Furthermore, the Client agrees and understands that they have no authority to give any instruction to any of Waimea Nurseries sub-contractors without the authority of Waimea Nurseries.
- 20.7 The Client agrees that Waimea Nurseries may amend these terms and conditions by notifying the Client in writing. These changes shall be deemed to take effect from the date on which the Client accepts such changes, or otherwise at such time as the Client makes a further request for Waimea Nurseries to provide Goods to the Client.
- 20.8 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.
- Both parties warrant that they have the power to enter into this contract and have obtained all necessary authorisations to allow them to do so, they are not insolvent and that this contract creates binding and valid legal obligations on them.

Signature: _____

Date: _____