

JFT NURSERIES

QUALITY THAT GROWS

JFT NURSERIES TERMS & CONDITIONS FOR BARE ROOT ORDERS

Definitions

1. "Business Day" means any day except:
 - (a) a Saturday or Sunday; or
 - (b) any other day, the whole or any part of which is observed as a public holiday throughout Victoria.

"Nursery" means JFT Nurseries Pty Ltd (ABN 18 060 885 127).

"Order" means a purchase order for goods placed by a Purchaser pursuant to the Bare Root Order Form and as varied in writing from time to time between the Nursery and the Purchaser.

"Plants" means the plant (and any plants propagated from them) in the number and variety listed on the Bare Root Order Forms.

"PPS Law" means:

- (a) the *Personal Property Security Act 2009* (Cth) ("PPS Act") and any regulation made at any time under the PPS Act (each as amended from time to time); and
- (b) any amendment made at any time to any other legislation as a consequence of a PPS Law.

"Purchaser" means the purchaser stated on the Bare Root Order Form.

"Terms of Trading Account" means the terms set out in the Trading Account Application Form.

Sale and Purchase

2. The Purchaser has agreed to purchase from the Nursery and the Nursery has agreed to sell to the Purchaser the Plants at the price as stated on the order confirmation provided to them.
3. The Purchaser has agreed to pay for any applicable fees as stated on the order confirmation.
4. Payment is not deemed to have been made until the Nursery receives cleared funds.

JFT NURSERIES

QUALITY THAT GROWS

5. The Nursery may accept a payment plan over a short period of time. This will be at the sole discretion of the Nursery.
6. The Purchaser is to pay the Nursery on demand interest at the rate of 10% per year on all overdue amounts owed by the Purchaser to the Nursery, calculated daily.
7. All costs and expenses associated with collecting overdue amounts, including legal fees and internal costs and expenses of the Nursery, are to be paid by the Purchaser as a debt due and payable under these terms and conditions.
8. The Nursery and the Purchaser agree to comply with their obligations in relation to GST under the *A New Tax System (Goods and Services Tax) Act 1999* and any other applicable legislation governing GST.
9. To the extent permissible at law, the Nursery may charge a surcharge for payments made by credit card.
10. The Nursery will use all reasonable endeavours to ensure that the Plants are propagated using healthy plant material. The Nursery will not be responsible for any loss or damage caused by pests, diseases or viruses, even if such pests, diseases or viruses subsists in the Plants at the time of delivery or collection by the Purchaser.
11. The Purchaser acknowledges that the propagation of Plants is subject to a variety of factors over which the Nursery has little or no control. These factors may result in the Nursery not being able to deliver the number of Plants contracted for. In such circumstances, the number of Plants ordered shall be deemed to be varied by agreement to the number of Plants that the Nursery delivers and the Nursery shall be deemed not to be in breach of this Contract of Sale by delivery of the reduced number of Plants.
12. Subject to clause 11, the Purchaser must notify the Nursery in writing of any alleged shortfall in the numbers of, or damage to the Plants delivered within three (3) Business Days of the date of delivery to the Purchaser.
13. If the Purchaser has not notified the Nursery in accordance with clause 12, the Purchaser shall be deemed to have waived its rights against the Nursery for any claims arising from or related to the relevant notification.
14. The Nursery makes no recommendation of any one cultivar or rootstock in preference to any other, or claim to be an authority on any one cultivar or rootstock. The Purchaser acknowledges that it accepts responsibility for its own choices of Plant, cultivar or rootstock irrespective of any recommendations, advice or information provided by the Nursery.

JFT NURSERIES

QUALITY THAT GROWS

Ordering Plants

15. Requesting order of bare root plants

- (a) The Purchaser may provide to the Nursery a request for the supply of plants by submitting a Bare Root Order Form provided by the Nursery.
- (b) Stock is allocated to orders in February subject to availability, with order confirmations sent to customers during the month of March.
- (c) Order reductions or cancellations made by the Purchaser must be advised in writing to the Nursery prior to the 1st of May. Any late changes are not guaranteed and the Purchaser shall have no right of refusal of goods ordered and confirmed.
- (d) Orders are preferred in multiples of 5 (broken bundle surcharge of 20% may apply). Minimum order of 50 trees required (subject to availability).
- (e) Up until dispatch, the Nursery may automatically increase supplied quantities up to the original value requested by the Purchaser, unless they expressly opt out of this condition.

Supply and Delivery of Plants

16. Supplier's Obligations

Subject to clause 11, the Nursery must:

- (a) supply the Plants to the Purchaser in accordance with any reasonable directions provided by the Purchaser in writing; and
- (b) confirm with the Purchaser the date, time and location that delivery of the Plants will take place or when the Plants can be collected at the Nursery's premises by the Purchaser or its Agent.

17. Delivery of Plants

- (a) Subject to clause 22, where orders are booked for delivery more than three (3) months ahead of time, the Nursery will not be liable for non-delivery or late delivery, if this is caused by the trees not growing to a standard size, due to adverse weather or other conditions which the Nursery cannot control.
- (b) Freight charges will apply in addition to the cost of the Plants. Freight estimates provided to the Purchaser may be subject to change due to order alterations or unforeseen third party price changes or fuel levies.

JFT NURSERIES

QUALITY THAT GROWS

- (c) Subject to the Nursery providing reasonable written notice to the Purchaser, the delivery times and dates made known to the Purchaser are estimates only and may be changed.

18. Unloading of Plants

General arrangements for unloading the Plants must be agreed between the Nursery and the Purchaser (and the Nursery and the Purchaser each will bear their respective costs, if any, in relation to such arrangements).

No Warranty

19. The Purchaser acknowledges that no information, representation or warranty has been made by the Nursery as to:

- (a) the origin, fitness for purpose or quality of the Plant;
- (b) the suitability of the plant for the Purchaser's needs and environment; and
- (c) the performance of the Plant and fruit variety to which it belongs,

and the Purchaser acknowledges that it has not relied on any such information, representation or warranty.

20. No warranties or representations are made whatsoever by the Nursery about the Plants. In particular, no warranties or representations are made by the Nursery:

- (a) that the Plants will grow;
- (b) that the Plants will grow into a crop that is fit for any particular purpose or end use;
- (c) that the Plants will produce fruit;
- (d) that the fruit produced by the Plants will be fit for:
 - (i) any particular purpose, commercial or domestic;
 - (ii) end use; or
 - (iii) human consumption.

21. All other conditions and warranties which are implied by law or by trade usage including in particular any identity, trueness to type, merchantability or fitness of the Plants for any particular purpose are hereby excluded to the maximum extent permitted by law.

JFT NURSERIES

QUALITY THAT GROWS

Limitation of Liability

22. Any liability of the Nursery incurred under this Contract of Sale shall be limited to the maximum extent permitted by law to replacement of the relevant Plants or a refund of the price of the relevant Plants, at the absolute discretion of the Nursery. The Purchaser hereby expressly waives its rights to and releases the Nursery from all claims and/or liabilities and indemnifies and holds harmless the Nursery accordingly.
23. Notwithstanding anything contained to the contrary in this Contract of Sale and to the fullest extent permitted by law, the Nursery shall not be liable to the Purchaser for any indirect, consequential, special, punitive or exemplary damages, or for damages for loss of anticipated profit, revenue, contract, opportunity or goodwill, regardless whether such claim is based on contract, tort, equity or otherwise.

Retention of Title and Risk

24. The risk in the Plants passes to the Purchaser at the point of departure of the Plants from the Nursery's premises, whether the Nursery delivers the Plants to the Purchaser or whether the Plants are collected by the Purchaser.
25. The Purchaser must ensure that it has the appropriate insurance cover at the time of dispatch and/or collection of the Plants from the Nursery's premises.
26. Ownership of the Plants does not pass to the Purchaser until the Purchaser has paid in full for the Plants.
27. Until the Purchaser has paid the Nursery the full price for the Plants, the Purchaser acknowledges and agrees that:
 - (a) the Plants sold are held by the Purchaser in a fiduciary capacity as bailee (to be sold by it as agent for and on behalf of the Nursery);
 - (b) irrevocably appoints the Nursery to be its attorney to do all acts and things necessary to ensure the retention of title to goods including the registration of any security interest in favour of the Nursery with respect to the Plants under applicable law;
 - (c) must be able upon demand by the Nursery to separate and identify as belonging to the Nursery, Plants supplied by the Nursery from other goods which are held by the Purchaser;
 - (d) agrees that the Nursery may repossess the Plants if payment is not made within thirty (30) days (or such longer time as the Nursery may, in its complete discretion, approve in writing) of delivery of the Plants;

JFT NURSERIES

QUALITY THAT GROWS

- (e) the Plants will be kept in a healthy and proper condition by the Purchaser until ownership of the Plants passes to the Purchaser;
- (f) the Purchaser grants an irrevocable licence to the Nursery or its agent to enter the Purchaser's premises in order to recover possession of the Plants pursuant to this clause. The Purchaser indemnifies the Nursery for any damage to property or personal injury which occurs as a result of the Nursery entering the Purchaser's premises.

Personal Property Securities

28. Where Plants are supplied by the Nursery to the Purchaser without payment in full of all moneys payable in respect of the Plants provided by the Nursery, the Purchaser acknowledges that the Nursery has a right to register and perfect a personal property security interest.

29. If:

- (a) a PPS Law applies or commences to apply to these terms of trade or any transaction contemplated by them, or the Nursery determines (based on legal advice) that this is the case; and
- (b) in the Nursery's opinion, the PPS Law:
 - (i) does or will adversely affect the Nursery's security position or obligations; or
 - (ii) enables or would enable the Nursery's security position to be improved without adversely affecting the Purchaser,

the Nursery may give notice to the Purchaser requiring the Purchaser to open a trading account with the Nursery and the Terms of Trading Account including the personal property securities provisions therein shall apply.

Termination

30. Termination by notice

- (a) This Contract of Sale may be terminated by either the Nursery or the Purchaser providing the other with thirty (30) days' notice in writing. Notwithstanding any provision to the contrary, the Purchaser cannot cancel their Order after the 1st of May, unless the Nursery has confirmed in writing that they are able to supply such goods to another Purchaser.
- (b) A penalty payment of 15% of the total order will apply to the Purchaser if any cancellation of their order is made after the cut off date of the 1st of May.

JFT NURSERIES

QUALITY THAT GROWS

Dispute Resolution

31. If a dispute arises in relation to this Contract of Sale, the Nursery and the Purchaser agree to first attempt to resolve the dispute through negotiating in good faith.
32. If negotiations cannot resolve the dispute within thirty (30) days, the Nursery and the Purchaser agree to submit the dispute to mediation.
33. The Nursery or the Purchaser may apply to the court for urgent interlocutory relief even if the mediation procedure has not started or been completed.
34. The mediation procedure is as follows:
 - (a) either party may start mediation by serving a mediation notice on the other, stating briefly and clearly the nature of the dispute;
 - (b) when the other party receives the mediation notice, both parties must try to agree on a mediator. If they fail to agree within fourteen (14) days of service of the mediation notice, either party may apply to the President of the Institute of Arbitrators and Mediators to appoint a mediator;
 - (c) each party must pay an equal share of the mediation costs;
 - (d) the parties must comply with the mediator's instructions about the conduct of the mediation;
 - (e) if the dispute is settled by mediation, each party must sign the terms of settlement, which will bind the parties and override the terms of this Contract of Sale if there is any conflict;
 - (f) if the dispute is not settled within ninety (90) days after the mediator has indicated to the parties his or her acceptance of the appointment (or within any other period the parties agree in writing), the mediation must cease.
35. Mediation is to take place in Victoria unless the parties agree otherwise.
36. Any terms of settlement may be used in evidence in any court proceedings.
37. The mediation procedure is confidential and:
 - (a) nothing the parties or the mediator say or do during the mediation procedure; and
 - (b) no documents concerning the dispute created for the mediation procedure, may be used in or required to be produced in any court proceedings.

JFT NURSERIES

QUALITY THAT GROWS

Force Majeure

38. Observation or compliance with the terms of this Contract of Sale

Other than an obligation to pay money, no party will have any obligation to observe or comply with the terms of this Contract of Sale to the extent that the observance of, or compliance with, those terms is prevented by Force Majeure.

39. Liability

A party's failure to observe or comply with the terms of this Contract of Sale will not give rise to any liability of that party to the extent that the failure to observe or comply with those terms is attributable to Force Majeure.

40. Claiming protection or benefit to Force Majeure

A party claiming the benefit or protection of clauses 38 or 39 must at its own cost:

- (a) promptly give notice to the other party, as soon as it becomes aware of the Force Majeure, of the occurrence and circumstances in respect of which the claim arises;
- (b) take all reasonable steps (without being required to incur material costs or expenses) to remedy the consequences of that occurrence without delay and give the other parties on request details of the steps that have been taken or are to be taken; and
- (c) resume performance in full of its obligations under this Contract of Sale as soon as reasonably practicable and give the other parties notice as soon as it is able to resume performance of its obligations.

41. Force Majeure

- (a) For the purposes of this Contract of Sale, Force Majeure means an act of God, lock out or other interference with work, war declared or undeclared, epidemic, lightning, fire, drought, earthquake, storm, flood, explosion, government or quasi-government restraint, prohibition, intervention, direction, embargo, or strike or other industrial action or any other cause whether of the kind specifically set out above or otherwise which is not reasonably within the control of the person relying on the force majeure except where such cause or event would have been avoided or prevented through reasonable foresight or acting in accordance with this Contract of Sale.
- (b) Force Majeure does not include any events or circumstances referred to in clause 41(a) caused by a lack of or unavailability of funds or as a result of any event or chain of events brought about by the wilful or negligent action or inaction of a party seeking to claim the benefit under the 'Force Majeure'

JFT NURSERIES

QUALITY THAT GROWS

clause. Each of the terms within clause 41 is to be construed separately and independently. None of them is to limit the generality of any other.

42. Termination pursuant to Force Majeure

If a party is unable to observe or comply with the terms of agreement due to Force Majeure ("Affected Party") and it does not resume performance of its obligations within fourteen (14) days after that Force Majeure arose then the other party may immediately terminate this Contract of Sale by notice in writing to the Affected Party.

Notices

43. Any notice or other communication (each a "notice") given under this Contract of Sale is:

- (a) to be in writing addressed to the address of the intended recipient shown in this Contract of Sale or to such other address as has been most recently notified by the intended recipient to the party giving the notice; and
- (b) deemed to have been given and served:

Method	Time
By hand/courier	at the time of delivery
Ordinary mail	Ten (10) days after the day of posting
Facsimile	at the time recorded on the transmitting machine
Email	when the sender's computer indicates that the message has been received provided it has not bounced

but if delivery or receipt is after 5.00pm on a Business Day, the notice is deemed to have been given and served on the next Business Day. For the purpose of this clause, a reference to time is a reference to the local time in Melbourne, Victoria, Australia and a reference to a Business Day means a gazetted Business Day in Melbourne, Victoria, Australia.

No Waiver

44. A failure, delay, relaxation or indulgence by either the Nursery or Purchaser in exercising any power or right conferred on the party by this Contract of Sale does not operate as a waiver of the power or right.

JFT NURSERIES

QUALITY THAT GROWS

45. A single or partial exercise of the power or right does not preclude a further exercise of it or the exercise of any other power or right under this Contract of Sale.
46. A waiver of a breach does not operate as a waiver of any other breach.

Governing Law and Jurisdiction

47. This Contract of Sale shall be governed by and construed in accordance with the law for the time being in force in the State of Victoria and the parties agree to submit to the exclusive jurisdiction of the Courts in the State of Victoria.

Severability

48. If any provision of this Contract of Sale offends any Laws applicable to it and is consequently illegal, invalid or unenforceable, then:
 - (a) where the offending provision can be read to give it a valid and enforceable operation of a partial nature, it must be read to the minimum extent necessary to achieve that result; and
 - (b) in any other case the offending provision must be severed from this Contract of Sale, in which event the remaining provisions of this Contract of Sale operate as if the severed provision had not been included.

Variation

49. This Contract of Sale may only be varied by written agreement signed by the parties. Any variation, modification or waiver not in writing signed by the parties shall be of no force and effect.

No Assignment by Parties

50. This Contract of Sale is personal and shall not be assigned without the written consent of the other party.

Relationship Between Parties

51. Nothing contained herein shall constitute the relationship of partnership or employer and employee between the parties hereto and it is the express intention of the parties that any such relationships are denied.