

Heritage Way Pty Ltd ACN 065 172 849

trading as Domus Nursery (**Domus Nursery**)

ABN: 97 065 172 849

50 Bahen Road

HACKETTS GULLY WA 6076

Phone: (08) 9293 1768

Fax: (08) 9293 3786

Email: [sales@domusnursery.com.au](mailto:sales@domusnursery.com.au)

**Heritage Way Pty Ltd ACN 065 172 849** trading as  
Domus Nursery (**Domus Nursery**)

## 1 Definitions

- (a) **Amount Payable** means the amount determined by clause 8(a);
- (b) **Cancellation Fee** means if there is no Deposit, between 30% and 70% (calculated in accordance with clause 7(b)) of the value of the remaining or cancelled Goods the subject of an Order, otherwise the Deposit;
- (c) **Credit Card Surcharge** means, subject to amendment from time to time in accordance with the *Competition and Consumer Amendment (Payment Surcharges) Act 2016* (Cth) and any related legislation or regulations, between 1% and 2%;
- (d) **Customer** means the customer or client (or any person acting on behalf of and with the authority of the customer or client) placing an Order with Domus Nursery;
- (e) **Delivery Charges** means the delivery charges specified in the Quotation, advised by Domus Nursery to the Customer from time to time or as specified on the Domus Nursery website at [www.domusnursery.com.au](http://www.domusnursery.com.au) ;
- (f) **Deposit** means the amount specified in the Quotation or if no amount is specified, 30% of the value of the Order;
- (g) **Estimated Delivery Date** means the estimated delivery or collection date for the Goods, being (unless notified by Domus Nursery otherwise) a reasonable time after an Order is placed by the Customer with Domus Nursery;
- (h) **Goods** means goods, products or services supplied by Domus Nursery to the Customer pursuant to an Order;

- (i) **GST** has the same meaning as in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth);
- (j) **Guarantor** means each person who has agreed at any time to be a guarantor of the Customer's obligations to Domus Nursery (if any);
- (k) **Interest Rate** means 3% per annum calculated daily, above the annual business overdraft interest rate of its principal banker, as determined and calculated by Domus Nursery, in its discretion;
- (l) **Order** means an order placed by the Customer with Domus Nursery for the supply of Goods, whether pursuant to a Quotation or otherwise;
- (m) **PPSA** means the *Personal Property Securities Act 2009* (Cth);
- (n) **Quotation** means a quotation issued to the Customer by Domus Nursery at the request of the Customer to purchase Goods from Domus Nursery;
- (o) **Special Order** means orders of the kind contemplated by clause 19 and include any Goods referred to on the Quotation as Special Orders; and
- (p) **Stock Maintenance Fee** means the value equal to 10% of the value of the Goods held by Domus Nursery in accordance with clause 5(i) calculated by Domus Nursery and payable monthly in arrears by the Customer to Domus Nursery for each month or part thereof that the Goods remain at Domus Nursery's Premises.

## 2 Application of Terms

- (a) The terms and conditions set out in this document (**Terms**) apply in every case where Domus Nursery provides Goods to a Customer unless otherwise agreed in writing between Domus Nursery and the Customer.

(b) Acceptance of Goods by the Customer or instructions received by Domus Nursery from the Customer for the supply of Goods, is conclusive evidence before any court that these Terms (as varied under clause 24.12) apply and are binding on it and the Guarantors (if any) referred to in clause 15.

(c) Subject to clause 23, if there is any inconsistency between these Terms and the terms of any Quotation for the provision of Goods, these Terms prevail.

### 3 Quotation

(a) Any written Quotation is based on the quantities listed, and is exclusive of Delivery Charges that shall, unless otherwise stated in the Quotation, be borne by the Customer.

(b) The prices quoted do not include GST and GST is to be borne by the Customer.

(c) A Quotation remains open for acceptance and the prices remain valid until the date specified in the Quotation, and if no date is specified, for 14 days from the date of the Quotation.

(d) The quantity, quality and description of and specifications of the Goods are unless otherwise agreed, as set out in the Quotation.

(e) Provision of a Quotation by Domus Nursery to the Customer does not constitute a contract.

(f) Domus Nursery may at any time, and in its absolute discretion, amend or withdraw a Quotation.

(g) The items listed on the Quotation are available with delivery times and the date as quoted but are subject to sale to other customers prior to the Customer accepting the Quotation and placing the Order for the Goods.

(h) If there is no Quotation, any Goods supplied to the Customer will be supplied on the basis of Domus Nursery's then current price list (**Price List**).

(i) The Price List is subject to change from time to time without notice. It is available on our website and via our stock list.

(j) If there is any dispute between the parties as to the Price List, the Price List of the Goods shall be deemed to be the last current Price List as notified by Domus to, and agreed by, the Customer until such time as the dispute is resolved.

### 4 Orders

(a) Subject to clause 3(c), if a Quotation has been provided to the Customer an Order placed by the Customer shall be in accordance with that Quotation and is subject to these Terms.

(b) Domus Nursery may, despite providing a Quotation and in its absolute discretion and for any reason, refuse to accept an Order that may be placed with it by the Customer.

(c) Once a Customer has placed an Order with Domus Nursery and Domus Nursery has accepted that Order in full or in part, the Customer may not vary, amend or cancel the Order without Domus Nursery's prior consent.

### 5 Delivery

(a) Domus Nursery may vary an Estimated Delivery Date by prior written notice to the Customer. Domus Nursery shall make all reasonable efforts to deliver the Goods or have the Goods available for collection on the Estimated Delivery Date but shall not be responsible for any consequential, indirect or other loss incurred as a result of any failure by Domus Nursery to do so.

(b) Any failure or inability by Domus Nursery to deliver or have the Goods available for collection on the Estimated Delivery Date shall not confer any right on the Customer to cancel or terminate the Order, these Terms, or to refuse to accept delivery of or collect the Goods or to claim damages from Domus Nursery for breach of contract or to bring any other action against Domus Nursery.

(c) All Goods purchased by the Customer are at the risk of the Customer from the time the Goods are delivered to or collected by the Customer or its nominated agent.

(d) Delivery is deemed to occur when the Goods are delivered:

- (i) to a carrier for transporting to the Customer; or
- (ii) if the Goods are delivered directly to the Customer, unless otherwise agreed in writing, at the kerbside of the Customer's nominated premises,

whether Domus Nursery arranges, procures or effects the transport of the Goods at the request of the Customer or otherwise.

- (e) Collection is deemed to occur when the Customer, its nominated agent or transport carrier, removes or carries the Goods off Domus Nursery's premises or land.
- (f) Where delivery is to be made during a certain period, Domus Nursery may at its option deliver the Goods in instalments during that period.
- (g) If Domus Nursery delivers the Goods to the Customer, then the Customer shall pay the Delivery Charges and Domus Nursery shall be entitled to choose the carrier for and manner of delivery or transport.
- (h) Any measures requested by the Customer to protect the Goods in transit shall be at the Customer's expense.
- (i) If the Customer is, for any reason, unable or fails or refuses to take delivery of or collect the Goods on the Estimated Delivery Date, including where Domus Nursery has specifically agreed to an extension to the Estimated Delivery Date, the Goods will be held by Domus Nursery and the Customer agrees to pay the Stock Maintenance Fee to Domus Nursery until such time as the Customer accepts delivery of the Goods.

## 6 Deposit

- (a) If required by Domus Nursery, the Customer must pay the Deposit within 7 days of being notified of Domus Nursery's acceptance of the Order and the request for a Deposit to be paid.
- (b) The Deposit will form part of the purchase price of the Goods and is non-refundable.

## 7 Cancellation Fee

- (a) If the Customer cancels an Order without Domus Nursery's prior written consent or, subject to clause 10(a), fails or refuses to take delivery of any of the Goods then the Customer must pay the Cancellation Fee.
- (b) The Cancellation Fee is determined by reference to whether the Goods the subject of the Customer's Order are capable of resale. If, in the reasonable opinion of Domus Nursery, following the cancellation of an Order by the Customer:
  - (i) the Goods cannot be resold and must be disposed of, the Cancellation Fee will be 70% of the Order amount;
  - (ii) some of the Goods can be resold and some must be disposed of, the Cancellation Fee will

be determined by Domus Nursery by reference to those Goods that Domus Nursery can re-sell to recover its losses and will be no more than 65% of the Order amount; and

- (iii) all of the Goods can be resold, the Cancellation Fee will be 20% of the Order amount

each being a genuine pre-estimate of Domus Nursery's minimum probable loss in such circumstances.

## 8 Payments by the Customer

- (a) Domus Nursery will issue an invoice to the Customer at the time an Order is delivered to or collected by the Customer indicating the amount due and owing to Domus Nursery (**Amount Payable**).
- (b) The Customer must pay the Amount Payable on or before the due date for payment shown on the invoice (**Due Date**), which, unless otherwise stated for credit account holders, is 30 days from the end of the month in which the invoice is issued, with time being of the essence.
- (c) An Amount Payable by the Customer under these Terms must be paid without deduction, retention or set-off of any kind and for any reason.
- (d) Domus Nursery may appropriate any money, including any Deposit, paid to it by the Customer in such manner and at such times as Domus Nursery, in its absolute discretion, determines.
- (e) The amount stated in a statement signed by Domus Nursery's duly authorised representative or solicitor as being due and payable by the Customer to Domus Nursery under these Terms is evidence that such amount is owing.
- (f) Domus Nursery may, at its discretion, apply a credit balance in any of the Customer's trading accounts with Domus Nursery towards satisfaction of a debit balance in any of the Customer's other trading accounts.
- (g) Payment by cheque or other negotiable instrument is not deemed to be payment of any Amount Payable until the cheque or other negotiable instrument is met on first presentation for payment.
- (h) In addition to the Amount Payable, where Domus Nursery incurs a Credit Card Surcharge due to the Customer paying the Amount Payable by credit card, it may (at Domus Nursery's discretion)

recover the Credit Card Surcharge from the Customer.

- (i) Where Domus Nursery delivers or transports the Goods to the Customer, the Amount Payable will include the Delivery Charges.

## 9 Retention of Title

- (a) Title to all Goods purchased by the Customer that have not been paid for (**Bailed Goods**) remains with Domus Nursery until they are paid for in full.
- (b) The Customer must hold all Bailed Goods in the possession of the Customer:
  - (i) as fiduciary, bailee and agent for Domus Nursery;
  - (ii) in such a manner that the Bailed Goods remain clearly identifiable and are able to be matched to specific invoices; and
  - (iii) safe and free from deterioration, destruction, loss or harm.
- (c) The Customer is authorised to sell the Bailed Goods in the ordinary course of its business, but only until notified in writing to the contrary by Domus Nursery or the occurrence of any event listed in clause 9(d)
- (d) If the Customer or any person who has guaranteed the due payment of the Customer's debts to Domus Nursery:
  - (i) becomes an 'externally-administered body corporate' within the meaning of the *Corporations Act 2001*;
  - (ii) has any step taken for its winding up or dissolution;
  - (iii) holds a meeting of directors which considers a resolution that an administrator should be appointed;
  - (iv) is insolvent within the meaning of the *Corporations Act 2001*, or is taken or presumed to be insolvent;
  - (v) commits an 'act of bankruptcy' within the meaning of section 40 of the Bankruptcy Act 1966, as amended from time to time;
  - (vi) has distress, attachment or other execution levied or enforced over any of its property;
  - (vii) fails to pay the entire Amount Payable in accordance with these Terms;
  - (viii) breaches any other provision of these Terms or any other agreement with Domus Nursery;

- (ix) if, without the prior consent of Domus Nursery, there is a change in control of the Customer (as defined in the *Corporations Act 2001*) or the Customer's business is sold to another person,

the Customer must immediately notify Domus Nursery and Domus Nursery may, at its election and without prejudice to other rights which Domus Nursery may have:

- (x) declare the Amount Payable immediately due for payment; and
  - (xi) enter the premises at which the Bailed Goods are kept (**Premises**) and remove the Bailed Goods from the Premises.
- (e) Domus Nursery may sell or otherwise dispose of any Bailed Goods recovered by Domus Nursery under this clause 9 in its absolute discretion and on its own account, without limitation to any other rights which Domus Nursery may have.
  - (f) The Customer indemnifies Domus Nursery and every person acting on Domus Nursery's behalf against any loss, damage, liability or expense incurred or sustained as a result of the reasonable exercise by Domus Nursery of its rights under this clause 9.
  - (g) This clause 9 is for the benefit of Domus Nursery, and Domus Nursery may waive the benefit of this clause by giving notice in writing to the Customer at any time.
  - (h) Despite the other provisions of this clause 9 and without prejudicing its rights in any way, Domus Nursery may take any action it deems necessary, including legal proceedings to recover any Amount Payable as a liquidated debt.
  - (i) The Customer acknowledges and agrees:
    - (i) that Domus Nursery owns the Bailed Goods and has a security interest in the Bailed Goods which extends to the proceeds (including any account) and any accession;
    - (ii) that to the extent to which the money owing by the Customer to Domus Nursery under these Terms represents all or part of the purchase price owing to Domus Nursery in respect of the Bailed Goods, that security interest will be a purchase money security interest;
    - (iii) to execute any documents and provide all relevant information and full cooperation to Domus Nursery to ensure Domus Nursery has a

first ranking perfected security interest in the Bailed Goods under the PPSA;

- (iv) not to change the Customer's name or contact details (including address) without Domus Nursery's prior written consent; and
- (v) that Domus Nursery may register any financing statement, financing change statement or other documents and do all other things which are necessary or desirable to perfect and maintain Domus Nursery's security interest under these Terms, to preserve its interest in the Bailed Goods and to realise Domus Nursery's security interest with the agreed priority, at the Customer's expense.

- (j) Clauses 16(f) to 16(i) inclusive of these Terms apply to the security interest referred to in this clause 9.

## 10 Risk in Goods and Customer Obligations

- (a) The Customer must inspect all Goods:
  - (i) delivered to the Customer or its nominated agent within 48 hours of delivery to the relevant Premises; or
  - (ii) if collected by the Customer or its nominated agent or transport carrier, prior to removing the Goods from Domus Nursery's premises or land,

**(Inspection Period)** in order to ensure that Goods delivered or collected are as ordered by the Customer and are not delivered or collected in a damaged state. The Customer must notify Domus Nursery within the relevant Inspection Period if Goods are found to be other than as ordered by the Customer or have been delivered or collected in a damaged state.

- (b) Subject to clause 12(a)(iii) if the Customer has not notified Domus Nursery within the relevant Inspection Period that Goods delivered or collected were not as ordered by the Customer, or that Goods were delivered in a damaged state, then the Goods will be deemed to have been delivered in good condition, as ordered and are accepted by the Customer (**Acceptance**).
- (c) Goods supplied by Domus Nursery are taken to be resold by the Customer in the same consequential order as the Goods have been supplied by Domus Nursery. All Goods of the same type as the Bailed Goods will be deemed to have been supplied by Domus Nursery unless the Customer proves to the

contrary at the time Domus Nursery claims to be entitled to possession of such Goods.

- (d) To the extent permitted by law, if the Customer is in breach of these Terms, Domus Nursery may (without prejudice to any other rights) repossess the Bailed Goods and the Customer licences Domus Nursery and its employees and agents to enter its premises at any time without notice for such purpose, with all related costs of Domus Nursery to be paid by the Customer on demand.

## 11 Returns

Before Acceptance, the Customer has the right to return for replacement or reimbursement any Goods found to be defective provided that:

- (a) the Goods must be returned in the same condition as delivered or collected by the Customer; and
- (b) Domus Nursery will refuse any claim for replacement or reimbursement in respect of any Goods that have been removed from their original containers and packaging or in Domus Nursery's sole opinion, have been kept in an unhygienic condition.

## 12 Liability

- (a) Subject to clause 10(b), Goods supplied by Domus Nursery are deemed to be defective if the Goods:
  - (i) are not of acceptable quality;
  - (ii) being in the nature of services, are not of a reasonable standard, quality, value or grade; or
  - (iii) do not comply with any consumer guarantee or implied warranty applicable to the supply of the Goods which cannot be excluded (including under the *Competition and Consumer Act 2010 (CCA)*).
- (b) When Goods are defective (as defined in clause 12(a)) Domus Nursery may, at its option elect to:
  - (i) replace the Goods;
  - (ii) reimburse the Customer for the cost of supplying the Goods;
  - (iii) supply goods that are as far as reasonably possible equivalent to the Goods;
  - (iv) in the case of Goods being in the nature of services, re-supply the service; or

- (v) if:
    - (A) payment of the purchase price for the Goods has not been made by the Customer – release the Customer from any obligation to pay the purchase price; or
    - (B) payment of the purchase price for the Goods has been made by the Customer - refund the purchase price to the Customer, subject to the Customer, where applicable, first restoring the unencumbered ownership of the Goods to Domus Nursery; and
  - (vi) in any case, reimburse to the Customer any cost incurred by the Customer in transporting the Goods back to Domus Nursery.
  - (c) To the extent permitted by law and other than any remedies the Customer may have under the CCA, the sole remedies of the Customer under or in relation to these Terms or the supply of Goods under them, whether in contract, in tort (including the law of negligence), under statute or otherwise, are only as specified in these Terms and are subject to the limitations set out in clause 12(d) and the following limitations:
    - (i) Domus Nursery does not warrant that the Goods are free from and will not be responsible for any loss or damage caused by pests, diseases and/or viruses latent or patent.
    - (ii) Domus Nursery makes no guarantee as to the suitability of any of the Goods for any specific use. Domus Nursery does not recommend any one particular type of Goods in preference to any other or claim to be an authority on any one of its Goods.
    - (iii) Domus Nursery does not warrant or represent that any particular Goods, part of Goods or stock or service will be available or become available at any time. Goods advertised may differ in appearance from those in stock.
    - (iv) Any description of the Goods under these Terms shall not create an express warranty that any Goods shall conform to that description.
    - (v) Provision of a sample does not constitute a warranty that all goods shall conform to the sample or model.
  - (vi) The Customer shall make its own determination of the suitability of the material for the use contemplated by the Customer. All information is believed to be correct and is given in good faith. The Customer shall not rely upon any of Domus Nursery's or Domus Nursery's employees, representatives or agent's skill or judgment.
  - (vii) Domus Nursery, and Domus Nursery's officers, employees and agents, will not have any liability or other obligation to any person or other entity, including the Customer, arising out of, or in any way directly or indirectly connected with, the matters referred to in clause 12(a) except to comply with its obligations (subject to the other provisions and limitations in this clause 12) under clause 12(b).
  - (viii) All conditions, warranties and other terms pertaining to the condition or quality of Goods are excluded to the extent permitted by law (including the CCA).
  - (ix) The Customer must not make any claim or demand, or take any action or other proceeding against Domus Nursery, or any of Domus Nursery's officers, employees or agents, for any loss of profits, loss of revenue, loss of anticipated savings, loss or corruption of data, loss of contract or opportunity, loss of goodwill or any indirect, special or consequential loss or damage of any nature arising out of, or in any way directly or indirectly related to these Terms and/or the supply of Goods under them including in relation to any of the matters referred to in clause 12(a).
  - (d) To the extent permitted by law, Domus Nursery's total liability for any claim under or in relation to these Terms and/or the supply of Goods under them is limited to the price paid by the Customer for the Goods the subject of the claim.
- 13 Interest and Enforcement Costs**
- (a) If any Amount Payable is not paid by the Due Date in accordance with these Terms, Domus Nursery may charge and recover interest on the outstanding amount at a rate equivalent to the Interest Rate.

- (b) If the Customer breaches its obligations under these Terms, the Customer must immediately pay to Domus Nursery on demand, all costs and expenses incurred by Domus Nursery in the enforcement of these Terms including, without limitation, costs and expenses including legal costs (on a full indemnity basis) freight costs, storage costs, electricity and telephone charges (except to the extent such costs and expenses directly result from Domus Nursery's breach of these Terms). The Customer authorises Domus Nursery to debit any trading account held by the Customer (**Trading Account**) with such costs and expenses.

#### **14 Plant Breeder's Rights**

- (a) The Customer acknowledges that the Goods may be protected in that the rights to them are owned by a third party owner or breeder and they are subject to the *Plant Breeder's Rights Act 1994 (PBR)*.
- (b) The Goods are supplied on the sole and express basis that they will not be propagated (as defined in the PBR) and that the Customer shall not breed the Goods in any way or sell or part with possession of the Goods to any person or entity who has not agreed to these Terms.
- (c) The Customer acknowledges that damages may not be a sufficient remedy for breach of this provision and that injunctive relief would be appropriate in the event that Domus Nursery has reason to believe that the Customer or someone else may breach this provision.
- (d) So far as permitted by law, in the event that the third party owner of the Goods has any preferential rights of ownership to any mutation derived from those Goods then the Customer agrees to acknowledge and accept those preferential rights and not to challenge any such rights.

#### **15 Guarantee**

- (a) In this clause 15, Guarantor means each person who has agreed at any time to be a guarantor of the Customer's obligations to Domus Nursery, including on application for a credit account by the Customer.
- (b) In consideration of Domus Nursery agreeing to supply Goods to the Customer at the request of the Guarantor on these Terms, the Guarantor unconditionally and irrevocably guarantees (and if

more than one, then jointly and severally) to Domus Nursery:

- (i) the payment of any Amount Payable; and
  - (ii) the performance of each of the Customer's obligations under these Terms.
- (c) If and to the extent that any Amount Payable is not paid when due, the Customer's Guarantor must immediately on demand from Domus Nursery pay to Domus Nursery the amount of the Amount Payable and/or any other amount payable under these Terms that has not been paid.
- (d) If the Customer fails to perform the Customer's obligations under these Terms when they are due, the Guarantor must immediately on demand from Domus Nursery cause the Customer to perform the Customer's obligations under these Terms.
- (e) As a separate and principal obligation, the Guarantor indemnifies Domus Nursery against any loss, cost or liability suffered, paid or incurred by Domus Nursery in relation to:
- (i) any failure of the Customer to perform the Customer's obligations under these Terms; or
  - (ii) the failure of the Guarantor to cause the Customer to perform the Customer's obligations under these Terms.
- (f) This clause 15 is enforceable against a Guarantor whether or not Domus Nursery has:
- (i) made demand upon the Customer;
  - (ii) given notice to the Customer or any other person in respect of anything;
  - (iii) taken any other steps against the Customer or any other person; or
  - (iv) failed to lodge, register or perfect any mortgage, charge or security interest granted by the Customer in connection with its obligations to Domus Nursery,

and whether or not the guarantee given by the Guarantor under this clause 15 is unenforceable for any reason, either in whole or in part.

#### **16 Security Interest**

- (a) In these Terms:
- (i) **Personal Property** means such of the Secured Property as comprises the Customer's and/or Guarantor's present and after-acquired personal property as defined in the PPSA;

- (ii) **Secured Property** means all of the Customer's and/or Guarantor's present and after-acquired real and personal property of whatever kind and wherever situated and whether held by the Customer or Guarantor in its own right or as trustee of a trust; and
  - (iii) the terms **accession, account, collateral, financing statement, financing change statement, inventory, proceeds, purchase money security interest, secured party and security interest** have the same meanings as in the PPSA.
- (b) The Customer and the Guarantor each:
- (i) grant to Domus Nursery:
    - (A) a security interest (in the nature of a charge) in all the Customer's and Guarantor's Personal Property including the proceeds of any such property and any accession;
    - (B) a fixed charge over all the Customer's and Guarantor's other Secured Property which is not Personal Property; and
  - (ii) agree to mortgage all of its present and future interests in any real property to the Supplier, on request from the Supplier, as a continuing security for the payment of any and all money owing by the Customer and the due performance of all its other obligations to Domus Nursery under these Terms.
- (c) The Customer and the Guarantor must each:
- (i) within 10 days of request from Domus Nursery, execute such documents as Domus Nursery requires to perfect the security interest, charge and mortgage; and
  - (ii) pay on demand any duty (including any fines and penalties) assessed on the charge or mortgage.
- (d) Unless Domus Nursery otherwise agrees, the costs of registering a financing statement must be paid by the Customer and may be debited against the Customer's Trading Account.
- (e) The Customer and each Guarantor acknowledge that Domus Nursery, by virtue of the charge and mortgage, has a caveatable interest in any real property of the Customer and/or the Guarantor which is or becomes subject to the charge and/or mortgage and may lodge a caveat over that property.
- (f) The Customer and each Guarantor appoints Domus Nursery (and if Domus Nursery is a corporation, each officer of Domus Nursery for the time being) as its agent and authorised representative for the purpose of requesting information from other secured parties under section 275 of the PPSA.
- (g) Without limiting any other provision of these Terms, the Customer and each Guarantor waives its rights to receive any notice under the PPSA (including a copy of any verification statement) unless the notice is required by the PPSA and that requirement cannot be excluded.
- (h) If Chapter 4 of the PPSA would otherwise apply to the enforcement of the security interest created under these Terms, the Customer and each Guarantor agrees with Domus Nursery that:
- (i) nothing in section 125, Division 6 of Part 4.3 and section 143 of the PPSA will apply to these Terms or the security interest under it; and
  - (ii) it waives its rights to do any of the following:
    - (A) object to the purchase of the collateral by Domus Nursery under section 129;
    - (B) receive a statement of account under section 132(3)(d) following a disposal showing the amounts paid to other secured parties and whether security interests held by other secured parties have been discharged;
    - (C) receive a statement of account under section 132(4) if there is no disposal; and
    - (D) redeem the collateral under section 142.
- (i) The Customer, the Guarantor or Domus Nursery will not disclose information of the kind mentioned in section 275(1) of the PPSA unless required by law.

## 17 Credit terms

The Customer acknowledges and agrees that:

- (a) all information provided by the Customer to Domus Nursery in connection with any application for a credit account with Domus Nursery is true and correct;

- (b) Domus Nursery may use all information obtained in connection with the Customer to assess or re-assess the Customer's credit worthiness, and for this purpose Domus Nursery may obtain from or supply to a credit reporting body such information about the Customer as Domus Nursery reasonably requires;
- (c) Domus Nursery may limit the amount of any credit available to the Customer from Domus Nursery, or amend that limit, at any time by written notice to the Customer;
- (d) Domus Nursery may refuse credit to the Customer and/or cancel all credit facilities granted by Domus Nursery to the Customer in Domus Nursery's absolute discretion at any time, without notice and without giving any reason; and
- (e) Domus Nursery may (at any time) do all things necessary or desirable to obtain (whether from any trade reference given by the Customer, credit provider, credit reporting body or otherwise) any information required by Domus Nursery to decide whether to provide (or continue to provide) credit to the Customer including to assess Domus Nursery's credit history or credit-worthiness.

## 18 Attorney

- (a) The Customer and each Guarantor irrevocably appoints Domus Nursery and each of Domus Nursery's authorised officers, jointly and severally, to be its attorney to do any act or thing which it is required to do under these Terms.
- (b) Domus Nursery may only exercise the power set out in clause 18(a) where the Customer or Guarantor (as applicable) is in breach of these Terms. Domus Nursery may exercise its powers even if this involves a conflict of duty and even if it has a personal interest in doing so.
- (c) A third party may rely on a copy of these Terms certified by a solicitor as evidence of the appointment of Domus Nursery as the attorney of the Customer or Guarantor.
- (d) The Customer and each Guarantor must ratify all acts and things done by Domus Nursery and its authorised officers in the exercise of the power of attorney granted in accordance with this clause.

## 19 Special Orders

Despite anything else to the contrary in these Terms or any Quotation, the Customer agrees that:

- (a) Special Orders are orders for:
  - (i) Goods that are not normally stocked by Domus Nursery and must be specifically grown for the Customer; or
  - (ii) Goods for supply to the Customer at a future time at least 2 months after placing the Order for the Goods.
- (b) Unless otherwise agreed in writing, before commencing a Special Order, Domus Nursery reserves the right to receipt of payment upfront or payment of the Deposit as specified in the Quotation.
- (c) The Customer agrees that Domus Nursery will only grow Goods that are for Special Orders on the undertaking that the Customer will accept delivery or collection of, and effect payment for these Goods.
- (d) The Customer agrees that there are no refunds or returns on Special Orders.
- (e) Domus Nursery agrees that the Customer may reduce a Special Order in quantity or cost by up to 10% without charge but the balance of the Special Order must be paid in full in accordance with this clause 19.

## 20 GST

If Domus Nursery has any liability to pay GST on the supply of any Goods to the Customer, the Customer must pay to Domus Nursery an amount, equal to Domus Nursery's GST liability, at the same time as the consideration is paid for the Goods, (unless the consideration for that supply is expressed specifically to be GST inclusive).

## 21 Privacy disclosure and consent

- (a) The Customer authorises Domus Nursery to:
  - (i) obtain credit information about its personal, consumer and commercial credit worthiness from any bank or trade referee disclosed in this document or credit account application and from any other credit provider or credit reporting body for the purpose of assessing this application for credit, or in connection with any guarantee given by the Customer;
  - (ii) use, disclose or exchange with other credit providers and entities, information about the Customer's credit arrangements in order to assess the Customer's application for credit,

monitor credit worthiness and collect overdue accounts; and

- (iii) disclose the contents of any credit report on the Customer to Domus Nursery and any of their solicitors and mercantile agents.

- (b) The Customer acknowledges that a complete copy of Domus Nursery's Privacy Policy is available on the Domus Nursery website.

## **22 Access by Customer**

- (a) On receipt of a written request by the Customer, Domus Nursery may, in its sole discretion and subject to any direction by Domus Nursery, grant the Customer access to the business premises of Domus Nursery for the sole purpose of examining the Goods for sale to the Customer.
- (b) The Customer must access the business premises in such a way as to cause as little disruption as possible to Domus Nursery's business.

## **23 Additional Terms**

The additional terms, covenants and conditions (if any) set out in the Quotation or application for credit are deemed to be incorporated into these Terms as if fully set out in this document and if any inconsistency arises with the terms, covenants and conditions contained in these Terms then those additional terms, covenants and conditions set out in the Quotation will prevail.

## **24 General**

### **24.1 Interpretation**

In these Terms, unless the context otherwise requires:

- (a) a reference to legislation or to a provision of legislation includes a modification or re-enactment of it, a legislative provision substituted for it and a regulation or statutory instrument issued under it;
- (b) a reference to a party to these Terms includes the party's successors, permitted substitutes and permitted assigns and, where applicable, the party's legal personal representatives; and
- (c) a right or obligation of any two or more persons confers that right or imposes that obligation, as the case may be, on each of them severally and on any two or more of them jointly.

### **24.2 Nature of Goods**

The Customer acknowledges that all Goods will be purchased for the purpose of re-supply or in connection with a business

carried on by the Customer with or without other persons and not for personal, domestic or household use.

### **24.3 Time of essence**

Time is to be of the essence insofar as it relates to the Customer's or a Guarantor's obligations to Domus Nursery under these Terms.

### **24.4 Delays - force majeure**

The Customer agrees and acknowledges that growth and performance of the Goods is dependent on a wide range of conditions beyond Domus Nursery's control. Domus Nursery is not responsible for any delay or failure of performance occasioned or caused by transport or traffic delays, fire, frost, hail, plant disease or contamination, breakdown of plant and equipment, shortage of materials or labour, flood, storm or tempest, theft, vandalism, civil unrest or accidents of any kind, strikes, riots, fire, insurrection, embargoes, failure of carriers or suppliers, inability to obtain materials or transportation facilities, acts of God or of the public enemy, governmental tariffs and quotas, compliance with any law, regulation or other governmental or court order (whether or not valid), or other causes beyond the control of Domus Nursery, even if the cause could be alleviated by the payment of money, or the performance is prevented or delayed because of the failure by Domus Nursery.

### **24.5 No waiver**

- (a) A failure to exercise or a delay in exercising any right, power or remedy under these Terms does not operate as a waiver.
- (b) A single or partial exercise or waiver of the exercise of any right, power or remedy does not preclude any other or further exercise of that or any other right, power or remedy.
- (c) A waiver is not valid or binding on the party granting that waiver unless made in writing.

### **24.6 Assignment**

Domus Nursery may at any time assign its rights and interests or novate its rights and obligations (in whole or in part) under these Terms. The Customer must not assign its rights or obligations under these Terms without Domus Nursery's prior written consent, which consent may be refused or given subject to such terms and conditions as Domus Nursery may determine in its absolute discretion.

## **24.7 Severance**

If any provision of these Terms or their application to any person or circumstance is or becomes invalid or unenforceable, that provision will be taken to be omitted without invalidating or modifying the remaining provisions of these Terms, which will continue in full force and effect as if the invalid or unenforceable provision had not been included in them.

## **24.8 Indemnities**

Each indemnity in these Terms is a continuing obligation, independent of the other obligations of the party giving it and survives the end of these Terms or the supply arrangement between the Customer and Domus Nursery.

## **24.9 Further co-operation**

The Customer must do anything (including executing a document) Domus Nursery reasonably requires in writing to give full effect to these Terms.

## **24.10 Terms binding**

These Terms bind the Customer and each Guarantor both personally and as trustee of any trust of which it is trustee.

## **24.11 Notices**

Notices in respect of these Terms may be provided to the Customer and Guarantors by mail or facsimile to the recipient's address provided by it to Domus Nursery.

## **24.12 Variation of Terms**

Domus Nursery reserves the right to vary these Terms from time to time. It may give notice of any variation of these Terms by publishing the revised Terms on its website and may (but is not obliged to) notify the Customer and/or the Guarantors that it has done so on an invoice, statement or other written communication. If the Customer continues to deal with and place orders for the supply of Goods with Domus Nursery after any such variation of these Terms, the Customer is taken to have agreed to those Terms as varied and to have taken the supply of Goods on those varied Terms.

## **24.13 Governing law**

These Terms will be construed in accordance with and governed by the laws of Western Australia. The Customer and Domus Nursery submit to the non-exclusive jurisdiction of the courts of Western Australia.