

# Terms and Conditions

Upon signing the Commercial Terms (above), the Customer agrees to be bound by these Terms and Conditions.

## 1. Contract for Supply

1.1. Unless the Commercial Terms state that the Customer has requested and the Supplier has agreed to provide Additional Services, the Supplier's obligation under this Agreement is strictly limited to the supply of the Product.

1.2. The Customer acknowledges that the Supplier will supply the Product to the Customer for their collection, installation, use, ongoing maintenance and care. Unless the parties to the Agreement agree that Additional Services will be rendered, any liability on the Supplier to perform will be discharged upon the Customer collecting the Products from the Supplier.

1.3. The Customer acknowledges that it is their responsibility to inspect the Products at collection. All liability will pass to the Customer upon collection, subject to clauses 4 and 5.

1.4. Unless the parties agree in writing otherwise, the Customer will collect or arrange for their own delivery of the Products. If the parties agree that the provision of the Additional Services will include the Supplier delivering the Product to the Customer's nominated site, clause 10.1 will apply.

1.5. The Customer covenants and warrants that they have undertaken their own independent assessment of the site conditions and that their request for a particular Product reflects that assessment.

1.6. Unless the parties agree otherwise, The Customer acknowledges that the Supplier is not responsible for assessing the suitability of the Products for any particular site where the Products will be installed or planted. Should the parties agree that the negotiated Additional Services will include the Customer consulting with the Supplier to determine an appropriate Product or the Supplier assessing the suitability of the Product for a particular Product, clause 10.2 will apply.

1.7. Unless the parties agree otherwise, the Customer will arrange for installation of the Products at their nominated site. Should the parties agree that the negotiated Additional Services will include the Supplier installing or planting the Product to the Customer's nominated site, clause 10.3 will apply.

## 2. Deposits

2.1. The Customer acknowledges that the Supplier is entitled to require the Customer to pay a deposit. The balance of the Price is due upon the collection of the Product to the Customer or provision of the Additional Services, should they be applicable.

2.2. The Customer may only cancel any order or terminate this Agreement, the Customer by sending a written notice

to the Supplier no later than five (5) working days before either: collection of the Product was due to occur or when any applicable Additional Services were scheduled to be provided. If the Customer fails to give the requisite notice, any deposits, will be retained by the Supplier.

## 3. Terms of Payment and Price Determination

3.1. The Supplier may specify the means and method of payment and will provide a tax invoice specifying the conditions of payment and terms of trade.

3.2. Should the Customer fail to pay the any amounts strictly within the applicable terms of trade, the Customer shall be liable to pay or reimburse to the Supplier all recovery costs paid or payable including (but not limited to): legal costs on a solicitor/own client basis, mercantile costs, fees, expenses, bank charges, statutory or government fees, duty, search costs or other disbursements.

3.3. The Supplier may charge interest at the rate of 15% per annum on all outstanding balances, such interest to accrue daily from the date payment was due until the outstanding amount and any interest accrued thereon has been paid in full.

## 4. Retention of Title

4.1. The Customer agrees that legal and equitable title to any Product or Goods provided by the Supplier is retained by the Supplier until the Supplier receives payment in full from the Customer for the Goods and all other monies owing by the Customer to the Supplier at any time (including, where applicable, for the provision of services).

4.2. Prior to title passing to the Customer, the Customer:

- must hold the Goods as bailee and fiduciary agent of the Supplier;

- must store the Goods separate from its own goods and those of any other third party so that they are readily identifiable as the property of the Supplier;

- must keep the Goods in good and merchantable condition and fully insure the Goods against loss or damage however caused;

- must not sell the Goods except with the prior written consent of the Supplier or in the ordinary course of the Customer's business, provided that any such sale is at arms' length and on market terms;

- any proceeds of re-sale, insofar as they relate to the Goods shall be held on trust for the Supplier in a separate account; and

- must not create any encumbrance over the Goods which is inconsistent with the Supplier's title and ownership of the Goods.

4.3 If the Customer is in breach of this Agreement including (but not limited to) a failure by the Customer to make payment for the Goods by the date specified by the Supplier, the Customer must return the Goods to the Supplier immediately on demand.

4.4 If the Customer does not return the Goods to the Supplier on demand under this clause 4, the Customer irrevocably authorises representatives of the Supplier to enter upon any site where the Goods are located to take possession of the Goods without prior notice.

4.5 The Customer indemnifies the Supplier for all fees (including legal fees on a full indemnity basis), costs and expenses incurred or suffered as a result of any and all prosecution, actions, demands, claims or proceedings brought by or against the Supplier in connection with the retaking possession of the Goods or the exercise by the Supplier of its rights under this clause, and the Customer shall repay all such fees, costs, losses, damages, expenses or any other sums of money on demand.

## **5. Application of the PPSA**

5.1 The Customer acknowledges and agrees that the Supplier may apply to register a security interest in the Goods at any time before or after delivery of the Goods or installation of the Product. The Customer waives its right under s 157 of the PPSA to receive notice of any verification of the registration.

5.2 The Supplier can apply amounts it receives from the Customer towards amounts owing to it in such order as the Supplier chooses.

5.3 If the Customer defaults in the performance of any obligation owed to the Supplier under these Conditions or any other agreement for the Supplier to supply Goods to the Customer, the Supplier may enforce its security interest in any Goods by exercising all or any of its rights under these Conditions or the PPSA. To the maximum extent permitted by law, the Customer and the Supplier agree that the following provisions of the PPSA do not apply to the enforcement by the Supplier of its security interest in the Goods: sections 95, 118, 121(4), 125, 130, 132(3)(d), 132(4), 135, 142 and 143.

5.4 The Customer and the Supplier agree not to disclose information of the kind mentioned in s 275(1) of the PPSA, except in circumstances required by sections 275(7)(b)-(e) of the PPSA.

5.5 The Customer must promptly do anything required by the Supplier to ensure that the Supplier's security interest is a perfected security interest and has priority over all other security interests in the Goods.

5.6 Nothing in this clause is limited by any other provision of the Agreement or any other agreement between the parties.

## **6. Indemnities and Limitations**

6.1 The Supplier will not be liable for consequential loss or incidental damages of any kind including but not limited to damages to structures or services in the vicinity of the

Products, or any damage caused during delivery, installation, planting or during any consultation or site inspection by the Supplier (if such Additional Services are provided by the Supplier).

6.2 The Customer agrees to indemnify and keep the Supplier indemnified from and against all loss, damage, cost and expense which the Supplier sustains or incurs on account of any neglect or non-performance by the Customer of the Customer's obligations under this Agreement.

6.3 This indemnity will extend to any loss of reputation or goodwill that the Supplier may suffer by the Customer's negligent action of any nature.

## **7. Severance**

7.1. If any part of the Agreement is or becomes void or unenforceable, that part is or will be severed from the Agreement.

7.2. Such severance will be to the extent that all parts that are not or do not become void or unenforceable remain on foot and in full force and effect.

## **8. Variation**

8.1. Other than as expressly provided elsewhere in this document, the Agreement may only be varied by deed executed by the Supplier and the Customer.

## **9. Governing Law**

9.1. The Customer agrees that any disputes will be resolved under the West Australian jurisdictions and that the Agreement was executed and operates in West Australia.

## **10. Additional Services**

10.1. **Delivery-** In the event that the Customer has requested and the Supplier has agreed to deliver the Products to the Customer's nominated site, the following clause 10.1 will apply:

- a) The Supplier will advise the Customer of the available delivery dates on which delivery can occur. Every reasonable effort will be made by the Supplier to give delivery on or before the estimated delivery date. The time or date of delivery is an estimate and shall be calculated from the Supplier's receipt of the executed Agreement.
- b) Delivery on any proposed delivery date cannot be guaranteed and failure to deliver by such date shall not give the Customer a right of cancellation, a right to refuse acceptance of delivery or render the Supplier liable for damages.
- c) Any delivery costs will be payable in addition to the Price specified for the Products unless delivery is expressly included in the Commercial Terms or described under the Additional Services.
- d) The Supplier takes no responsibility for the ongoing health and integrity of the Products following delivery. Once the Products are delivered to site, the Customer is liable to maintain the Products and expressly

acknowledges that the Supplier is not responsible for the long term health or condition of the Products.

e) The Supplier reserves all rights to claim all extra costs incurred by any act or omission on the part of the Customer or any agent for the Customer, which results in additional work or delays in delivery.

F) Due care is taken in transporting the Product but The Supplier cannot guaranteed or take responsibility for any damage cause in the process of delivering The Product to the site.

g) The Customer acknowledges that it is their responsibility to inspect the Products at delivery.

**10.2. Site and Product Consulting-** In the event that the Customer has requested and the Supplier has agreed to assist the Customer in their selection of the Products, the following provisions will apply:

a) The Customer acknowledges that unless expressly noted, the Price does not include any process of assessment of the proposed installation site, the suitability of the Products for the site's conditions, the wider environment in which the Products are to be installed or the suitability of the species, age or condition of the Product.

b) The Customer acknowledges that any consultation and any service to inspect the proposed installation site is outside the scope of standard supply and would constitute Additional Services.

c) Should the Commercial Terms include Additional Services where the Supplier is sought to inspect and assess the proposed site, the Supplier will inspect the Customer's proposed site for installation and enquire as to variable conditions of which that site experiences and is exposed.

d) The Supplier will be in no way liable for any advice given unless that advice is provided in writing and relates expressly to the process of consultation following a detailed inspection and assessment. Verbal or informal advice given prior to any on-site consultation will not constitute formal advice and cannot be used to hold the Supplier liable in the event that the Product fails.

**10.3. Planting-** In the event that the Customer has requested and the Supplier has agreed to install or plant the Products at the Customer's nominated site, the following provisions will apply:

a) The Supplier will have reasonably free and unimpeded access to the site and surrounding areas on the occasions of installation, planting or associated site preparation.

b) No allowance has been made for the presence of any hazardous materials at the Customer's nominated site. Any costs associated with the removal, handling and other statutory requirements associated with any hazardous material, will be to the Customer's cost.

c) While care will be taken to ensure that any potential damage is minimised, the Supplier will not be held liable for any damage caused by digging or resulting from the preparation for or completion of installation or planting of the Products.

d) It is the Customer's responsibility to ensure that the site, the area below the surface of the site and the area

surrounding the site is free from any material, products or services (including but not limited to pipes or electrical cabling) that may be damaged by digging or the process of installation or planting.

e) Should the Product selected by the Customer be particularly large or if access to the site is difficult, machinery may be required to dig the site or to assist in installation or planting. Further, the Supplier may be require additional staff to assist in the installation or planting.

f) Any such machinery or additional staff required to complete any installation or planting Additional Services due to undisclosed site conditions, will be at the Customer's additional cost. These additional costs will be discussed with the Customer and any Price relating to the installation or planting of the Products will subject to renegotiation.

g) The Customer must clearly specify the location where the installation or planting will take place. If the Supplier deems that the Products cannot be installed at that location then the Product can either be left on site or returned to the Supplier's yard. Return to the Suppliers yard will incur a delivery fee.

h) Once the Products are installed at the site, should the Customer require the Product be moved to an alternative site, a replanting cost will be incurred.

i) The Supplier takes no responsibility for the ongoing health and integrity of the Products following installation.

j) Once the Products are installed on site, the Customer is liable to maintain the Products and expressly acknowledges that the Supplier is not responsible for the long term health or condition of the Products. This includes but is not limited to any implied obligation to inspect the Products following installation or planting, to feed, maintain or prune the Products.

k) The Supplier is under no obligation to ensure that the Customer is caring for the Products following the discharge of the Supplier's obligations under this Agreement.

l) The site is to be cleared of all objects to allow for free access to the work area(s). All objects are to be removed prior to any work being undertaken. While reasonable care will be taken, no liability will be accepted for any damage incurred to items left in or near the work area(s).

m) In no event will the Supplier be responsible for damage or harm occasioned to the Products following installation or planting at the site. Such damage may include but is not limited to: foliage breakage, leaf fall, physical abuse, mechanical impact damage, exposure to heat or flame, exposure to solvents, acids or chemicals of any type, windstorms, lighting, nails, screws, other plant life, animal life or abuse or damage of the Product by the Customer, by other persons or any act of God.

## **11. Product carrying bags**

11.1 Unless requested otherwise by the Customer, products are supplied in plastic potting bags or containers.

These containers in no way constitute a component of the Products. The

Supplier has made an assessment as to the best sized container for the particular variety.

11.2 The Products provided to the Customer may be presented in variant container sizes but this in no way reflects variant condition, age or species of the Product.

11.3 The bags/containers are intended to hold the Products as they grow and are not intended to be used as containers for transportation. The Supplier is equipped with the necessary skills and equipment to move the Products when contained in these bags/containers.

11.4 The Customer acknowledges that they are aware of the limited strength capabilities of these bags/containers and that they may fail in the event that the Customer attempts to move the Products when stored in these bags/containers.

11.5 The Supplier will be in no way liable for any harm or damage that may occur when the Customer collects or arranges delivery of the Products to their proposed installation site.

11.6 The Customer accepts and understands the risk associated with the bags/containers. The Customer understands and accepts that they must take all necessary precautions to avoid any injury or damage to the Products or any person or property.

## 12. Interpretation

**Additional Services** means any service or works performed by the Supplier that extends beyond the supply of the Product to the Customer. Additional Services will not be performed unless considered under the Commercial Terms. Additional Services include but are not limited to: delivery of the Products to the Customer, installation, planting or care of the Products after sale, inspection of the proposed site for suitability, clearing the site for installation or any associated works;

**Agreement Date** means the date on which the Agreement commences being the date the Customer signs the Commercial Terms;

**Agreement** means this contract for the supply of the Products and/or the supply of Additional Services (only if expressly considered under the Commercial Terms) as agreed by the parties and outlined in this document;

**Commercial Terms** means the agreed terms (titled "Commercial Terms") forming part of this Agreement;

**Customer** means that person(s) or party specified in the Commercial Terms being the consumer or purchaser of the Products, and the client or customer of the Supplier;

**Goods** means the Products together with any material, machinery, goods or equipment supplied by or on behalf of the Supplier in the fulfilment of their obligations under the Agreement;

**PPSA** means the *Personal Property Securities Act 2009* (Cth) which applies to the extent that the Supplier's interest in any Goods is a security interest. If a term used in the Agreement has a particular meaning in the PPSA, it has the same meaning in the Agreement;

**Price** means the consideration payable by the Customer in contemplation for the Supplier's performance of the Agreement as stated in the Commercial Terms;

**Products** means trees, shrubs, foliage, plants or any related products. The Product does not include any containers, packaging or pallets supplied by or on behalf of the Supplier; and

**Supplier** means the distributor and supplier of the Goods (including their employees or agents), to the Customer, specifically Ellenby Tree Farm Pty Ltd (ABN 54 007 280 202) its subsidiaries, trading entities or assigned entities.