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**BOOMAROO NURSERIES & WHOLESALE SUPPLIES PTY LTD ACN 007 005 861**  
**BOOMAROO TERMS OF TRADE**

## 1 Definitions

**ACL** means schedule 2, Competition and Consumer Act 2010 (Cth).

**Boomaroo, we, us** mean Boomaroo Nurseries & Wholesale Supplies Pty Ltd ACN 007 005 861, its successors and assigns.

**Consumer** has the same meaning as in the ACL.

**Consumer Guarantees** means the statutory guarantees in the ACL.

**Credit Application** means a Boomaroo credit application form.

**Customer** means the customer acquiring Goods on these Terms.

**Goods** mean any goods supplied by Boomaroo to the Customer.

**GST** means a tax, levy, duty, charge or deduction, together with any related additional tax, interest, penalty, fine or other charge, imposed by or under the GST Law.

**GST Law** means A New Tax System (Goods and Services Tax) Act 1999 (Cth).

**Insolvency Event** includes the winding up, dissolution or cessation of business, appointment of an administrator, liquidator, receiver or official manager, assignment for the benefit of creditors, scheme or arrangement with creditors, insolvency and bankruptcy of a person.

**PPSA** means the Personal Property Securities Act 2009 (Cth).

**Purchase Order** means the Customer's order for the purchase Goods as communicated by the Customer to Boomaroo.

**Sales Order Confirmation** means a written statement prepared by Boomaroo and provided to the Customer confirming the Customer's order for Goods as accepted by Boomaroo.

**Security Interest** has the meaning attributed to that term in the PPSA.

**Terms** includes these terms of trade for the sale of the Goods, the new customer application form and the Credit Application.

## 2 Purchase Orders and Sales Order Confirmations

2.1 We agree to sell and the Customer agrees to buy Goods in accordance with the Terms.

2.2 The Customer acknowledges that these Terms are deemed to be incorporated into all Purchase Orders accepted by us and all supplies of Goods to the Customer.

2.3 These Terms will prevail over any inconsistent terms in any of the Customer's documents and will supersede all previous negotiations and representations, whether oral or written for the same goods as well as earlier sets of terms and conditions issued, unless otherwise agreed by us in writing.

2.4 Any quotation for Goods prepared by us is not an offer by us and it may be withdrawn or altered without notice.

2.5 Unless we withdraw a quotation, it is valid for the stated period or if no period is stated, 5 days from the date of quotation.

2.6 All Purchase Orders will constitute an offer to buy the Goods specified and will be subject to acceptance by us in our absolute discretion.

2.7 If the Customer submits a Purchase Order or enters into a contract with us for those Goods, and Goods are delivered or invoiced to the Customer, or the Customer makes any payments to us, the Customer is taken to have accepted these Terms.

2.8 A Purchase Order will be binding on Boomaroo following written acceptance by us (typically as a Sales Order Confirmation). The Sales Order Confirmation is deemed to be an accurate reflection of the Purchase Order unless the Customer notifies us in writing of an error within 24 hours of the date of the Sales Order Confirmation.

2.9 Subject to clause 2.8, a Purchase Order cannot be varied or cancelled by the Customer once accepted by us without our written consent. We will not agree to any variation or cancellation unless the Customer agrees to indemnify us for any reasonable costs and expenses incurred as a result of or in connection with the variation or cancellation and must pay any reasonable variation or cancellation charge set by us.

2.10 Once we have accepted a Purchase Order, we will use reasonable endeavours to supply the Goods to the Customer. We reserve the right to vary or cancel a Purchase Order upon written notice to the Customer.

2.11 Risk in the Goods will pass to the Customer upon delivery of the Goods. Title to the Goods will not pass to the Customer unless and until the Customer has made full payment for the Goods.

## 3 Delivery of the Goods

3.1 Unless agreed otherwise in writing by the parties, the Goods will be delivered to the delivery address specified in the accepted Purchase Order unless otherwise agreed in writing by Boomaroo and the Customer.

3.2 The Customer must accept delivery of the Goods specified in the accepted Purchase Order during the delivery period specified by us from time to time.

3.3 We have sole discretion as to the method and carrier for delivery of the Goods.

3.4 To the full extent permitted by law, the Customer must indemnify us against any and all loss or damage suffered, or cost or expense incurred by us as a result of a Customer's refusal or attempted refusal to accept delivery of the Goods.

3.5 Any delivery date and time stated in a Sales Order Confirmation or otherwise quoted is an estimate only.

3.6 Late delivery of the Goods is not a breach of these Terms by us. To the extent the law permits, the Customer acknowledges and agrees that we are not liable to the Customer for any loss or damage arising from late delivery.

3.7 If we determine that it is or may be unable to deliver the Goods within a reasonable time (or at all) the accepted Purchase Order may be cancelled by us in our sole and absolute discretion by giving the Customer notice in writing of our intention of doing so.

3.8 To the extent the law permits, if a Purchase Order is cancelled, the Customer will have no claim against us for any loss or damage (including consequential loss or damage) arising from the cancellation.

3.9 To the extent the law permits, the Customer must indemnify us against any claim, loss or damage suffered by us, or as a result of us becoming liable to any third party (directly or indirectly) as a result of entry into any premises for the purpose of delivering the Goods by us or our employees, contractors or agents.

3.10 We may accept a return of Goods from the Customer in our absolute discretion. If we agree to accept returned Goods from the Customer, the Customer must return the Goods to us (at the Customer's sole cost) and the Customer acknowledges and agrees that it is liable to us for any loss we suffered as a result of the return of the Goods.

#### 4 **Quality Control and Inspection of the Goods**

4.1 While we adhere to a strict quality control program with respect to the Goods, we cannot guarantee and do not warrant the performance of the Goods.

4.2 The Customer must inspect the Goods we deliver immediately on supply of the Goods to the Customer, and must within 24 hours after the delivery of the Goods give written notice to us of any claim in the event that the Goods are defective, supplied in error, or if there are any discrepancies in the quantity delivered (including particulars of the claim).

4.3 If the Customer fails to give us written notice together with supporting photographic evidence pursuant to clause 4.2 above, then to the extent permitted by law, the Customer is deemed to have waived any and all entitlement to bring a claim against us in respect of the defect, shortage or error related to the Goods and the Goods are deemed to have been accepted by the Customer in accordance with the Terms.

4.4 Subject to clause 4.2, the Customer shall be deemed to have both accepted delivery of the Goods and confirmed that the Goods reflect those specified in the Purchase Order at the expiration of 24 hours from the time of each delivery.

#### 5 **Price of Goods and Payment Terms**

5.1 Subject to clause 2.3 the price for the Goods will be as stated in our price list as at the date of the relevant Purchase Order unless we have otherwise agreed in writing.

5.2 Any price concession provided to the Customer is conditional on the Customer's strict compliance with these Terms and the Purchase Order.

5.3 We will issue an invoice to the Customer with respect to the Goods delivered pursuant to a Purchase Order.

5.4 Unless we have granted the Customer Credit Facilities in accordance with clause 6, payment for the Goods must be paid in full by the Customer on delivery.

#### 6 **Credit Facilities**

6.1 If the Customer submits a Credit Application to us, the Customer irrevocably authorises us, our employees, contractors and agents to make such inquiries as we deem necessary to investigate the creditworthiness of the Customer from time to time.

6.2 Pursuant to a successful Credit Application (to be assessed at our sole and absolute discretion) payment by certain approved Customers (up to a limit specified in the Credit Application) will be due and payable thirty (30) days following the date of the invoice unless we have agreed to alternative terms (**Credit Facilities**).

6.3 The Customer acknowledges and agrees that:

(a) it is not entitled to any Credit Facilities until it receives notice in writing from us stating that credit facilities have been given and confirming the monetary limit of the approved Credit Facilities;

(b) a successful Credit Application shall have a monetary limit and we may request payment when the limit is reached or exceeded;

(c) we may terminate the Credit Facilities at any time;

(d) it must notify us of any facts which might reasonably affect our decision to provide Credit Facilities to the Customer at the time a Purchase Order is submitted;

(e) in the event of a default of payment under these Terms we may disclose all information relating to the Customer to our collection agency for the purpose of receiving any or all amounts outstanding; and

(f) it is liable to pay our reasonable costs with respect to collecting any overdue monies, including legal fees, debt collection costs and payment of our administrative costs.

6.4 We may demand immediate payment of all amounts outstanding (whether or not then due and payable) if:

(a) the Customer does not comply with these Terms;

(b) we consider that the creditworthiness of the Customer has become unsatisfactory;

(c) one or more Insolvency Events occur; or

(d) the Credit Facilities are terminated by us.

6.5 If we have granted the Customer Credit Facilities and we (acting reasonably) are of the opinion that the Customer's creditworthiness is or has become unsatisfactory, we may require additional security be provided by the Customer. We shall be entitled to withdraw the Credit Facilities until such security or additional security is obtained. We shall not unreasonably withdraw the Credit Facilities.

6.6 Without limiting any of our rights, we may charge interest at a rate of 18% per annum calculated daily and compounded monthly on any overdue amounts not paid by the Customer by the date for payment on and from the date the monies first became due to us.

#### 7 **GST**

7.1 In addition to any amounts payable by Customer to us, the Customer must pay us an additional amount on account of GST. We will issue the Customer a tax invoice in the form required by the GST Law.

7.2 The Customer must pay GST, without deduction or set off of any other amounts, at the same time and on the same basis as the Customer pays for the Goods.

7.3 The Customer indemnifies the Company for any loss that we may incur as a result of the incorrect payment or non-payment of any GST and associated fees or penalties.

7.4 If we become liable for any penalties or interest as a result of a late payment of GST, where that late payment is as a direct result of a failure of the Customer to comply with this clause 7, the Customer must pay us an additional amount on demand equal to the amount of those penalties and interest.

#### 8 **Customer Acknowledgements**

8.1 The Customer acknowledges and agrees that:

(a) we grow the seedlings that comprise the Goods in response to accepted Purchase Orders;

(b) we are not liable for the performance of the Goods;

(c) its decision to buy the Goods is based solely on the Customer's judgement and the Customer has not relied on any representation, description or statement by us relating to the Goods;

(d) the survival and growth of the Goods is subject to factors beyond our control including unsuitable soils or locations, weather, temperature, humidity or other climate conditions, handling, storage, weather, cultivation, farming practices, sprays, chemical treatments, attacks by fungus, disease, insects or other pests;

- (e) to the fullest extent permitted by law, we have not given any express or implied warranties, indemnities, representations or undertakings in relation to survival, growth or performance of the Goods including their survival, growth, vigour and/or performance of the seeds supplied to us by our suppliers;
- (f) all equipment (including frames and trays) used to transport the Goods to the Customer remains our property and must not be used for any purpose other than holding the Goods and must be kept safe by the Customer while in its custody and made available to us for collection immediately upon request; and
- (g) the Customer is liable to us for any loss or damage to the equipment described in clause 8.1(f).

## 9 Limitation of liability

- 9.1 We exclude to the full extent possible under law, all implied terms and warranties whether statutory or otherwise, relating to the subject matter of these Terms.
- 9.2 Subject to clause 9.4 and any other applicable laws, the Customer represents and warrants to us that Boomaroo, its employees, contractors and/or agents will not be liable to the Customer for any expense or injury (including indirect and consequential loss such as loss of revenue, profits, anticipated savings, goodwill or business opportunity, injury to the Customer's reputation) in contract, tort, under statute or otherwise unless such loss arises as a result of our negligence or wilful misconduct.
- 9.3 Our liability to the Customer for loss or damage of any kind arising out of these Terms or in connection with the relationship established by it is reduced to the extent (if any) that the Customer causes or contributes to the loss or damage. This reduction applies whether our liability is in contract, tort (including negligence), under any statute or otherwise.
- 9.4 The Consumer Guarantees only apply in circumstances where the Customer acquires the Goods as a Consumer in accordance with the ACL. In circumstances where the Consumer Guarantees are applicable, to the maximum extent permitted by law we limit our liability for a breach of a Consumer Guarantee to replacing the relevant Goods or refunding the price of the relevant Goods (at our election).

## 10 PPSA

- 10.1 To secure payment of monies due to us under these Terms, the Customer grants us a Security Interest in the Goods and the proceeds of sale of those Goods. While any amount or obligation of the Customer in these Terms remains to be unsatisfied, the Customer:
  - (a) warrants that the Goods are not and will not be used for any personal, household or domestic purpose;
  - (b) authorises us (at the sole cost of the Customer) to do anything which we consider reasonably necessary or desirable to affect the registration of its Security Interest on the Personal Property Securities Register to ensure that it is enforceable, perfected and otherwise effective and the Customer agrees to provide all assistance required to facilitate this;
  - (c) must immediately provide us with a copy of any notice the Customer receives under section 64 of the PPSA;
  - (d) irrevocably authorises us if it becomes entitled to repossess any or all of the Goods, to enter upon any premises where we reasonably believe any of the Goods are located and remove them; and
  - (e) acknowledges that we may immediately upon the Customer breaching these Terms (or any other agreement between us and the Customer relating to payment for any Goods that are subject to a Security Interest granted to us under these terms) take any action to enforce its Security Interest without demand or notice (to the extent permitted by law).
- 10.2 To the extent the law permits, the Customer waives its rights to receive from us any notice required to be provided under the PPSA and agrees that sections 142 and 143 of the PPSA do not apply to these Terms and that we need not comply with sections 95, 125, 130, 132(3)(d), 132(4) of the PPSA.

## 11 General

- 11.1 (**Variation**) We may seek to vary or replace these Terms by giving the Customer at least 14 days' prior written notice. Submission by the Customer of a Purchase Order after the date the variation takes effect will constitute acceptance by the Customer of the Terms as varied or replaced.
- 11.2 (**Change of Control**) The Customer must, no less than 14 days prior to any change of ownership, registered particulars, shareholding, directorship, name or address, provide us with written notice of the proposed change.

- 11.3 (**Privacy**) We will collect information in relation to the Customer, for the purpose of providing the Goods to the Customer under these Terms, and in accordance with the laws relating to the collection and disclosure of personal information under the Privacy Act 1998 (Cth) as amended from time to time.
- 11.4 (**Severance**) Any provision of these Terms which is unenforceable or partly unenforceable is, if possible, severed to the extent necessary to make these Terms enforceable, unless this would materially change the intended effect of these Terms.
- 11.5 (**Assignment**) The Customer must not assign its benefits or novate its obligations under these Terms without our prior written consent. We may assign our rights and novate our obligations under these Terms to another person without the consent of the Customer.
- 11.6 (**Waiver**) Any right of ours may only be waived in writing and signed by us. No other conduct operates as a waiver or prevents the exercise of the right. A waiver of a right by us on one or more occasions does not operate as a waiver of that right if it arises again. The exercise of a right by us does not prevent any further exercise of that right or of any other right.
- 11.7 (**Governing Law and Jurisdiction**) These Terms will be governed by and construed in accordance with the laws in force in Victoria. Each party submits to the non-exclusive jurisdiction of the courts exercising jurisdiction in Victoria, and any court that may hear appeals from any of those courts, for any proceedings in connection with these Terms, and waives any right it might have to claim that those courts are an inconvenient forum.
- 11.8 (**Entire Agreement**) The Terms together with any relevant Sales Order Confirmation and Credit Application accepted by us constitutes the entire agreement between us and the Customer and supersedes all prior representations, contracts, statements and understandings (both verbal or in writing). All other terms and conditions are excluded to the fullest extent permitted by law.
- 11.9 (**Trustee**) If the Customer has entered into these Terms in the capacity of as trustee of any trust under any trust deed and whether or not we have notice of the trust then the Customer enters into these Terms as trustee of the Trust as well as personally. The Customer represents and warrants that the Customer has power to enter into these Terms and to perform the obligations imposed under these Terms as trustee.