

NURSERY TREE SUPPLY AGREEMENT

This Agreement is made on the _____ day of _____ 2021

1. Parties

- 1.1. This Agreement is made between the Nursery described in Item 1 of Schedule 1 and the Purchaser described in Item 2 of Schedule 1.
- 1.2. A reference to a party shall include that party's executors, administrators and assigns and where that party is a corporation, its administrators and assigns.
- 1.3. If the Purchaser is comprised of more than one persons or corporations, this Agreement shall bind all such persons and/or corporations jointly and severally.

2. Purchase of Trees

- 2.1. The Nursery agrees to provide the Purchaser with the Trees specified in Item 3 of Schedule 1 for the fees set out in Item 4 of Schedule 1 on the terms and conditions specified in this Agreement.
- 2.2. The Nursery will provide the Purchaser with the Trees that comply with the classification set out in Item 3 of Schedule 1 of this Agreement. A classification of a Tree as being Grade 1A, Grade 1B, Grade 2A, Grade 2B or Grade 3 in Item 3 of Schedule 1 is a reference to the Almond Nursery Tree Classification Standard which is set out in Schedule 2 of this Agreement and forms part of this Agreement. For clarity any classification of a Tree as a Grade 1A, 1B, 2A, 2B or 3 of the Almond Nursery Tree Classification Standard must comply with the criteria listed under the heading "*Criteria that must be met for all grades*" in the Almond Nursery Tree Classification Standard and the specific criteria listed under each grading category.

3. Fees

- 3.1. The Purchaser shall pay to the Nursery the fees by the scheduled dates as described in Item 4 of Schedule 1 to this Agreement for services provided as follows:
 - 3.1.1. for cultural services which includes but is not limited to the provision of skilled personnel to select proper budding materials and to carry out budding procedures; and
 - 3.1.2. for management and maintenance of the rootstock and the Trees including watering, fertilising and generally caring for the Trees.
- 3.2. If any supply of goods or services under this Agreement is a taxable supply within the meaning of the GST Law, the price for the goods and/or services is to be stated as inclusive of GST.
- 3.3. The deposit is payable by the date specified in Item 4 of Schedule 1 of this Agreement. If the Purchaser cancels the order or breaches any of the terms and conditions of this Agreement, then the deposit shall be forfeited to the Nursery absolutely.
- 3.4. The Nursery is not under any obligation to carry out any services pursuant to the terms and conditions of this Agreement until such time as the Purchaser has paid the deposit as required by the terms of this Agreement.

4. Additional charges

- 4.1. The Nursery may, in addition to the fees charged in accordance with clause 3 of this Agreement, charge the Purchaser reasonable fees for wrapping, packaging, crating and

delivery costs and other costs and expenses subject to the Nursery having first obtained the written consent of the Purchaser to such proposed additional charges.

- 4.2.** At the discretion of the Nursery, the Nursery may charge a storage fee of \$1.50 per tree per month for storage and maintenance costs in the event that the Purchaser does not take delivery of the trees within 14 days of the date the Nursery notifies the Purchaser that the Trees are available for delivery. The storage fee cannot be charged by the Nursery once this Agreement has been terminated.

5. Interest

- 5.1.** The Purchaser shall pay interest at the rate from time to time fixed by the *Penalty Interest Rate Act 1983 (Vic)* on any money which the Purchaser has not paid in accordance with this Agreement.

6. Budding and/or grafting

- 6.1.** The Nursery shall:
- 6.1.1.** take proper care in the selection of budding material.
 - 6.1.2.** be responsible for the budding of the variety or varieties specified in Item 3 of Schedule 1 of this Agreement at a proper and reasonable time.
- 6.2.** In the event that any particular bud shall fail, the Nursery may substitute a similar budded root stock for that which has failed. For such purposes, the Nursery shall make proper allowance for failed buds in accordance with usual nursery practice taking in account the rootstock variety and variety of bud concerned.
- 6.3.** The Nursery shall take proper care in the selection of the budding material but nothing contained in this Agreement shall be construed as a warranty that any particular tree grown from budded rootstock will be true to type or variety.

7. Identification of Trees

- 7.1.** The Nursery shall maintain proper records which enable identification of the material supplied pursuant to this Agreement including all root stocks.

8. Maintenance of young Trees

- 8.1.** The Nursery shall during the propagation process maintain and care for all root stocks and young Trees pursuant to this Agreement according to generally accepted methods of nursery practice.
- 8.2.** The Nursery shall be responsible for the maintenance and care of such root stock and young Trees until the delivery of the Trees to the Purchaser or until the termination this Agreement.

9. Delivery

- 9.1.** Subject to clause 9.2 of this Agreement, the Nursery agrees the Trees will be ready for planting by the estimated delivery period as identified in Item 3 of Schedule 1 of this Agreement.
- 9.2.** The estimated delivery period is not a contractual commitment. The Nursery will use its best endeavours to meet the estimated delivery period. Where a delay in delivery is caused by any act, matter or thing beyond the control of the Nursery, including without limitation a variation requested by the Purchaser and/or seasonal conditions, the estimated delivery period shall be extended by a period agreed between the Nursery and the Purchaser or, failing such agreement, by a reasonable period. In no event shall the

Nursery incur any liability due to any failure on its part to deliver the Trees by the estimated delivery period.

- 9.3. The Purchaser acknowledges that seasonal or other conditions may result in the Trees being ready for delivery earlier than the estimated delivery period. In such an event, the Purchaser shall not be obliged to accept delivery of the Trees prior to the estimated delivery period.
- 9.4. Unless otherwise agreed by the parties in writing, the Nursery shall deliver the Trees to the delivery address of the Purchaser identified in Item 2 of Schedule 1 of this Agreement.
- 9.5. The Nursery shall not be responsible for unloading the Trees at the point of delivery.
- 9.6. Where the Trees are delivered to the nominated delivery address of the Purchaser, the Nursery shall be deemed to have delivered the Trees if it obtains a receipt or signed delivery docket for the Trees from any person at that address.
- 9.7. If the nominated delivery address is unattended, the Nursery may in its sole discretion store the Trees at Purchaser's risk and charge a storage fee in accordance with clause 4.2 of this Agreement until such time as the Trees are able to be delivered.
- 9.8. The Nursery will grade the Trees prior to delivery of the Trees to the Purchaser and will cull any Tree which does not meet the classification identified in Item 3 of Schedule 1 of this Agreement. The Purchaser reserves the right to refuse delivery of any Trees that do not meet the classification identified in Item 3 of Schedule 1 of this Agreement.

10. Reporting

- 10.1. The Nursery agrees to monitor the progress of growth of the young Trees and to keep the Purchaser regularly informed of such progress and of any expected variation in the estimated delivery period.
- 10.2. The Nursery shall inform the Purchaser at the earliest possible time of possible delays in the commencement of the estimated delivery period.
- 10.3. The Nursery shall keep the Purchaser informed of any significant seasonal changes or other events which may affect the Nursery's ability to deliver the Trees within the estimated delivery period.

11. No warranty

- 11.1. Except as expressly stated in this Agreement or as provided by law, no warranties are implied in respect of the quality, merchantability, fitness for purpose, condition or description of the Trees. Nothing in this Agreement is to be interpreted as excluding, restricting or modifying or having the effect of excluding, restricting or modifying the application of any State or Federal legislation applicable to the sale of goods or supply of services which cannot be excluded, restricted or modified.

12. Passing of risk

- 12.1. All risk in the Trees supplied to the Purchaser will transfer to the Purchaser on delivery. All risk in the Trees prior to delivery remains with the Nursery.

13. Passing of title

- 13.1. Until full payment in cleared funds is received by the Nursery for the Trees:
 - 13.1.1. Legal title and property in Trees supplied under this Agreement remain invested in the Nursery and does not pass to the Purchaser.
 - 13.1.2. The Purchaser holds any Trees not fully paid for as agent or bailee for the Nursery.

14. Personal Property Securities Act

- 14.1.** The PPSA applies to this Agreement and, for the purposes of the PPSA:
- 14.1.1.** terms used in this clause that are defined in the PPSA have the same meaning as in the PPSA; and
 - 14.1.2.** these terms are a security agreement and the Nursery has a Purchase Money Security Interest in all present and future Goods supplied by the Nursery to the Purchaser and the proceeds of the Goods;
 - 14.1.3.** The security interest is a continuing interest irrespective of whether there are monies or obligations owing by the Purchaser at any time; and
 - 14.1.4.** The Purchaser must do whatever is necessary in order to give a valid security interest over the Goods which is able to be registered by the Nursery on the Personal Property Securities Register.
- 14.2.** The security interest arising under this clause attaches to the Goods upon delivery. Where permitted by the PPSA, the Purchaser waives any rights to receive the notifications, verifications, disclosures or other documentation specified under sections 95, 118, 121 (4), 130, 132 (3)(d), 132 (4), 135 and 157 of the PPSA.
- 14.3.** The Purchaser agrees to contract out of the provisions of sections 96, 125, 129, 142 and 143 of the PPSA.
- 14.4.** To the extent permitted by the PPSA, the Purchaser agrees that:
- 14.4.1.** the provisions of Chapter 4 of the PPSA which are for the benefit of the Purchaser or which place obligations on the Nursery will apply only to the extent that they are mandatory or that the Nursery agrees to their application in writing; and
 - 14.4.2.** where the Nursery has rights in addition to those in Chapter 4 of the PPSA, those rights will continue to apply.
- 14.5.** The Purchaser must, immediately upon the request of the Nursery:
- 14.5.1.** do all things and execute all documents necessary to give effect to the security interest created under this Agreement; and
 - 14.5.2.** procure from any person considered by the Nursery to be relevant to its security position such agreements and waivers (including as equivalent to those above) as the Nursery may at any time require.
- 14.6.** The Nursery may allocate amounts received from the Purchaser in any manner it determines, including in any manner required to preserve any Purchase Money Security Interest the Nursery has in goods supplied by it.
- 14.7.** For the purposes of section 275 (6) of the PPSA, the Purchaser agrees that these terms and any information pertaining to the sale of goods and details of the goods shall be kept confidential at all times. Neither party may disclose any information pertaining to these terms or the sale of the goods, except as otherwise required by law or that is already in the public domain.

15. Default by Purchaser

- 15.1.** If the Purchaser shall:
- 15.1.1.** fail to pay any payments identified in Item 4 of Schedule 1 of this Agreement by the date on which such payment(s) falls due; and/or
 - 15.1.2.** refuse to accept delivery of the Trees after having been notified in writing of their availability for delivery.
- then the Nursery shall give the Purchaser written notice requiring such default to be remedied within fourteen (14) days of the date of such notice.
- 15.2.** Any written notice given under this clause by the Nursery must be send by pre-paid mail or email to the address of the Purchaser set out in Item 2 of Schedule 1 of this Agreement.

- 15.3.** If the Purchaser fails to remedy the default within the period specified in the written notice, then the Nursery may terminate this Agreement by notice in writing to the Purchaser to the address specified as the Purchaser's address in Item 2 of Schedule 1 of this Agreement. Such notice must be sent by pre-paid mail or email.
- 15.4.** On the termination of the Agreement in accordance with clause 15.3 of this Agreement:
 - 15.4.1.** The deposit and any payments already paid by the Purchaser shall be forfeited to the Nursery.
 - 15.4.2.** This Agreement shall be at an end.
 - 15.4.3.** The Purchaser shall cease to have any interest in the Trees that have not been delivered to the Purchaser.
 - 15.4.4.** The Nursery may sell the rootstock and/or Trees that have not been delivered to the Purchaser and if the Nursery incurs a loss from such sale, then that loss shall be recoverable by the Nursery from the Grower as a debt in any court of competent jurisdiction.

16. Insolvency Event

- 16.1.** If any party to this Agreement is subject to an Insolvency Event, then the other party, without limiting its other rights and remedies, may terminate this Agreement by giving the party subject to an Insolvency Event notice with immediate effect.
- 16.2.** For the purposes of this clause, an Insolvency Event means:
 - 16.2.1.** A party ceases business;
 - 16.2.2.** If a party is a corporation, a receiver, receiver and manager, trustee, administrator, liquidator or similar official is appointed over any or all of the assets or undertaking of that party;
 - 16.2.3.** If a party is an individual, an event occurs that would enable a court to grant a petition, or an order is made, for the bankruptcy of the individual or his or her estate;
 - 16.2.4.** A moratorium of any debts of a person, a personal insolvency agreement or any other assignment, composition or arrangement (formal or informal) with a person's creditors, or any similar proceeding or arrangement by which the assets of a person are subjected conditionally or unconditionally to the control of that person's creditors or a trustee, or is ordered, declared, or agreed to, or is applied for and is not withdrawn or dismissed within seven (7) days; or
 - 16.2.5.** A party becomes, or admits in writing that it is, or is declared to be, or is taken under any applicable law to be, insolvent or unable to pay its debts.

17. Force majeure

- 17.1.** If the Nursery is delayed, hindered or otherwise prevented from complying with the terms of this Agreement by reason of events or circumstances beyond the reasonable control of the Nursery including but not limited to Acts of God, wars, riots, acts of terrorism, strikes, lockouts, trade disputes or labour disturbances, breakdown of any plant or machinery, accident, storm, fire, flood, difficulties in obtaining materials, transport or labour or any other circumstances affected the supply of the Trees, then the Nursery shall not be liable to the Purchaser for any loss or damage which may be suffered by the Purchaser whether as a direct or indirect result of such occurrences.

18. Disputes

- 18.1.** A dispute concerning, arising out of or directly or indirectly relating to this Agreement, its meaning, existence, performance, breach, termination, validity or subject matter, will first be referred to mediation before a party may commence court proceedings.
- 18.2.** Clause 18.1 of this Agreement does not prevent a party making application to a court at any time to seek an interlocutory injunction.

19. Mediation

- 19.1.** The mediation procedure will be commenced by a party to whom a dispute relates serving a mediation notice on all other parties to this Agreement. That notice must state that a dispute has arisen and describe its nature.
- 19.2.** The parties will appoint a Mediator within 7 days of the service of the mediation notice. If the parties do not agree within that time as to the person to be nominated, either party may apply to the President for the time being of the Law Institute of Victoria who will nominate a mediator.
- 19.3.** The mediation will be conducted in accordance with the Law Institute of Victoria's Code of Practice for Mediation as amended from time to time and will be held a venue to be agreed by all parties.
- 19.4.** The parties will at all times maintain confidentiality about all matters arising in the mediation, except to the extent that such matters are already public knowledge or to such extent as may be agreed between the parties or as required by law.

20. Good faith

- 20.1.** The parties to a dispute agree to take part in mediation and will endeavour in good faith to resolve the dispute through mediation but any of them may at any time terminate the process and commence court proceedings after:
 - 20.1.1.** The party has taken part in mediation in accordance with clause 19 of this Agreement; and
 - 20.1.2.** has given the other parties to this Agreement a least seven (7) days written notice of the proposed court proceedings after the mediation was terminated following compliance with clause 19 of this Agreement.

21. Notices

- 21.1.** Unless expressed otherwise in this Agreement, a notice or other communication to a party must be in writing and delivered to that party in one of the following ways:
 - 21.1.1.** Delivered personally;
 - 21.1.2.** Posted to the party's address using pre-paid ordinary mail when it will be treated as having been received on the third business day after posting; or
 - 21.1.3.** Faxed to their facsimile number when it will be treated as received on the day of sending; or
 - 21.1.4.** Sent by email to the party's email address when it will be treated as received on that day.

22. No assignment

This Agreement must not be assigned without the prior written consent of the Purchaser. Such consent may be given or withheld at the absolute discretion of the Purchaser. Any assignment or purported assignment without the prior written consent of the Purchaser shall be void and of no effect.

23. Variation

This Agreement can only be varied in writing and signed by all of the parties to the Agreement.

24. Waiver

No single or partial exercise or delay in exercising any right, power or remedy by any party to this Agreement shall constitute a waiver by that party of, or preclude further exercise of, that or any right, power or remedy arising under this Agreement or otherwise.

25. Invalidity and Severance

To the extent that any provision of Agreement or the application of it is held to be invalid or unenforceable at law for any reason, that provision will be ineffective and severable from this Agreement without invalidating or modifying the remainder of the Agreement and the remaining provisions will be valid and enforceable to the extent the law allows

26. Whole Agreement

This Agreement contains the entire agreement between the parties. The parties confirm they have each entered into this Agreement without reliance on any warranty, statement or representation except those that have been included in this Agreement.

27. Jurisdiction

This Agreement is governed by the laws of Victoria and the parties submit to the jurisdiction of the courts of Victoria.

28. Definitions

In this Agreement, unless the contrary intention appears or the context otherwise requires:

"**Confidential Information**" means without limiting the generality of the term any technical, scientific, horticultural, commercial, financial or market information and know-how or trade secrets.

"**Goods**" means the Tree or Trees supplied by the Nursery to the Purchaser.

"**Insolvency Event**" means where a party is a corporation, an order is made or a resolution passed to wind it up except for reconstruction or amalgamation, goes into liquidation, is placed under official management, has a receiver or receiver and manager of any of its assets or an administrator appointed and where a party is an individual, the individual becomes bankrupt, commits an act of bankruptcy or tries to take advantage of Part IX of the *Bankruptcy Act* 1966 (Cth), makes an assignment for the benefit of creditors or enters into a composition or arrangement with creditors.

"**the Nursery**" shall mean the person or corporation described in Item 1 of Schedule 1 of this Agreement.

"**PPSA**" means the *Personal Properties Securities Act* 2009 (Cth) and its associated regulations as amended from time to time.

"**the Purchaser**" shall mean the person or corporation described in Item 2 of Schedule 1 of this Agreement.

"**Tree**" or "**Trees**" means the trees grown and supplied as identified in Item 3 of Schedule 1 of this Agreement by the Nursery to the Purchaser.

29. Interpretation

In the interpretation of this agreement:

- (a) References to legislation or provisions of legislation include changes or re-enactments of the legislation and statutory instruments and regulations issued under the legislation;
- (b) Words denoting the singular include the plural and vice versa; words denoting individuals or persons include bodies corporate and vice versa; references to documents or agreements also mean those documents or agreement as changed, novated or replaced, and words denoting one gender include all genders;
- (c) Grammatical forms of defined words or phrases have corresponding meanings;
- (d) Parties must perform their obligations on the dates and times fixed by reference to AEST;
- (e) Reference to an amount of money is a reference to the amount in the lawful currency of the Commonwealth of Australia;
- (f) If the day on or by which anything is to be done is a Saturday, a Sunday or a public holiday in the place in which it is to be done, then it must be done on the next business day;
- (g) References to a party are intended to bind their executors, administrators and permitted transferees; and
- (h) Obligations under this agreement affecting more than one party bind them jointly and each of them severally.

SCHEDULE 1

Item 1	Nursery Name: ABN / ACN: Address: Postal address: Facsimile: Email: Contact name: Phone number:
Item 2	Purchaser Name: ABN / ACN: Address: Postal address: Facsimile: Email: Contact name: Phone number: Delivery address:

Item 3**Order details****Variety:****Rootstock:****Tree quantity:****Estimated delivery period:****Classification of Trees:**

- Grade 1A tree
- Grade 1B tree
- Grade 2A tree
- Grade 2B
- Grade 3 tree
- Other classification

Criteria of Other classification of Trees:**Quotation:**

Cost per Tree inclusive of GST	Additional charges and details	Total GST per Tree inclusive of GST

Item 4	Fees Deposit: Deposit payable: Balance: Balance payable:
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SCHEDULE 2

ALMOND NURSERY TREE CLASSIFICATION STANDARD

Execution page

EXECUTED AS AN AGREEMENT

EXECUTION CLAUSES

***Execution clause for an individual**

SIGNED by **NAME OF INDIVIDUAL**)
in the presence of:)
)

.....
Witness

.....
Full name of Witness

***Execution clause for an individual trading as a business name**

SIGNED by **NAME OF INDIVIDUAL**)
trading as **INSERT NAME OF BUSINESS**)
(ABN) in the presence of:)

.....
Witness

.....
Full name of Witness

***Execution clause for a company with a sole director/secretary**

EXECUTED by **NAME OF COMPANY (ACN)** in)
accordance with section 127 of the *Corporations*)
Act 2001 (Cth):)

.....
Sole Director/Secretary

.....
Name of Sole Director/Secretary (Block letters)

***Execution clause for a company with two or more directors**

EXECUTED by **NAME OF COMPANY (ACN ??? ???**)
???) in accordance with section 127 of the)
Corporations Act 2001 (Cth):)

.....
Director

.....
Director

.....
Name of Director (Block letters)

.....
Name of Director (Block letters)

SCHEDULE 2

Almond Nursery Tree Classification Standard

The Almond Board of Australia through the Production Committee has recommended the following standards be considered when entering a Nursery Tree Supply Agreement. Growers may prefer a different tree structure on delivery and are encouraged to specify the requirements at the time of ordering.

Tree prices for each grade should be agreed between the grower purchaser and the nursery supplier and inserted into the Supply Agreement at the time of ordering and inserted into the Supply Agreement Item 3 Order details, tree classification and quote.

1. Source Material Criteria

- Unless directed by the grower the nursery is to use first generation, true to type, high health budwood material supplied by the Almond Board of Australia.
- Unless directed by the grower the rootstock is to be supplied by a high health propagator.

2. Nursery Tree Grades

Criteria that must be met for all Grades

- Tree is to be straight. Defined as less than 100mm deviance from the graft union.
- Graft union / bud height between 100mm and 180mm from the ground.
- The rootstock is to be no higher than 12mm above the graft union.
- Free of spurs (laterals) in the first 700mm from the ground.
- Suckers removed.
- Be free of pest, disease, weeds, weed seeds and soil.
- Be free of damage from animal, insect, fungal and climatic effects.
- No mechanical or physical damage from undercutting or other nursery operations.
- Have been left with a sound root system following lifting that can adequately support the tree (Figure 1).
- Treated with Nogall ® as per the grower's requirements.
- Washed and moist on delivery.
- Defoliated.

Grade 1A Criteria

- Minimum height of 1200mm taken from the ground level.
- Minimum diameter of 12mm at the graft union and 6mm diameter at 1200mm.
- Four to eight two-bud spurs (laterals) above 700mm that are no thicker than half the size of the trunk.

Grade 1B Criteria

- Same as Grade 1A without spurs/ laterals

Grade 2A Criteria

- Tree height between 850mm to 1199mm from ground level.
- Minimum diameter of 10mm at the graft union.
- Four to eight two-bud spurs (laterals) above 700mm that are no thicker than half the size of the trunk.

Grade 2B Criteria

- Same as Grade 2A without spurs/ laterals

Grade 3 Criteria

- Tree height between 500mm to 849mm from ground level.
- Minimum diameter of 10mm at the graft union.

3. Communication

- Growers should order trees providing sufficient time to produce a Grade 1 tree. The recommended timeframe is 15 months prior to the required delivery date for a spring budded tree (Figure 2).
- In-line with Clause 9 nurseries are to communicate the expected grade of trees at least two months prior to the agreed delivery date.
- Grade 3 trees (or lower) will require communication between nursery and grower to determine if these trees are to be grown-on as a two-year-old.

Figure 1. Sufficient root mass to support a Grade 1 tree.



Figure 2. Timeframe needed for ordering trees to produce high quality spring-budded trees.

