



WITHCOTT GROUP TERMS AND CONDITIONS

1. DEFINITIONS

- 1.1. Withcott Group Pty Ltd and any of its related bodies corporate (as defined by the Corporations Act 2001) or assigns, shall hereinafter be referred to as "Withcott".
- 1.2. The person, firm or company identified in Account Application, to whom Withcott may agree to supply shall be referred to as "the Customer".
- 1.3. "Goods" means the products, plants, seedlings or equipment supplied to the Customer by Withcott and shall include services.
- 1.4. "Services" means any services provided by Withcott to the Customer, including those which may be provided in the course of producing or incidental to the Goods.
- 1.5. "Offer" shall mean any offer by Withcott to supply Goods to the Customer, including any quotation or tender provided to the Customer by Withcott, with or without these terms and conditions of contract.
- 1.6. "Order" means an order placed by the Customer with Withcott for the supply of Goods and/or Services, whether or not those Goods and Services are identified in an Offer from Withcott to the Customer.
- 1.7. "Price" means the price to be paid by the Customer for the Goods.

2. GENERAL

- 2.1. Unless otherwise specified in writing an Offer is to remain open for 30 days from the date shown on it.
- 2.2. Prior to receipt of an Order, Withcott reserves the right to make any changes to any Offer as it considers necessary.
- 2.3. If the Customer shall verbally place an Order, a contract shall be deemed to have been made immediately upon acceptance in writing by Withcott and shall only be subject to alterations in strict accordance with the terms and conditions contained herein.
- 2.4. Withcott's standard practice is to accept Orders in writing. However, Withcott may, in its sole discretion, choose to accept a verbal Order from the Customer.
- 2.5. No contract shall be made between the Customer and Withcott until acknowledged in writing by Withcott.
- 2.6. On acceptance of the Order by Withcott, the parties shall be contractually bound and these terms and conditions shall be incorporated into, shall take precedence over any terms and conditions on which the purchaser Customer may trade (if any and regardless of whether those terms and conditions are made known to Withcott) and will form part of the contract between the parties.
- 2.7. These terms and conditions shall form part of and shall govern any contract entered into between Withcott and the Customer, unless they shall have been specifically modified or rescinded by Withcott in writing prior to Withcott's acceptance of the Order.
- 2.8. In the event that there is any conflict between these terms and conditions and those contained in an Offer or in any prior dealing between the parties, then these terms and conditions shall prevail to the extent of any inconsistency.

3. EXCLUSIONS

- 3.1. No dealing between Withcott and the Customer shall be or be deemed to be a sale by sample.
- 3.2. Subject to any terms implied by law which are not capable of exclusion, Withcott does not warrant the fitness for the Customer's purpose of any Goods.
- 3.3. The Customer will rely on its own knowledge and expertise in selecting any Goods and as to the suitability or fitness for any required purpose of any Goods.
- 3.4. Any advice, recommendation, information, assistance or service provided by Withcott in relation to the Goods or as to their use or application is given in good faith, and is believed by Withcott to be appropriate and reliable, at the time it is given.
- 3.5. The Customer acknowledges that Withcott has not made any warranty, guarantee or representation in relation to the Goods on which the Customer has relied (including as to the suitability or fitness of the Goods or any part of the Goods for a particular purpose or as to the matters set out in paragraph 3.4, apart from those which it has expressly received in writing from Withcott. For the avoidance of doubt, the Customer confirms that it has not relied on any of the written material prepared by Withcott, referred to in paragraph 4 below.
- 3.6. The Customer accepts all risk and responsibility for consequences arising from their use of the Goods whether singly or in combination with other products.
- 3.7. Whilst all steps are taken to grow and supply all Goods in a healthy and vigorous state and in a way that minimises the risk of disease, Withcott cannot guarantee and does not warrant the performance of the Goods beyond the date of their delivery.
- 3.8. Due to the existence of a large number of variable conditions which are beyond the control of Withcott and which may affect the Goods post delivery, the Customer acknowledges that no warranty as to duration of life can be made or is provided.
- 3.9. All warranties, terms and conditions in relation to the state, quality or fitness of the Goods, other than those expressly stated, and whether implied by statute, common law, custom of the trade, or otherwise are, to the extent that the law permits, expressly excluded.

4. DESCRIPTION

- 4.1. The descriptions, illustrations and/or statements as to performance or qualities of the Goods contained in catalogues, price lists and other advertising matter do not form part of the contract.
- 4.2. Any samples which are produced by Withcott are merely representative of the Goods and are subject to the provisions of paragraph 3.1 and 4.1 above.

5. PLACEMENT OF ORDERS

- 5.1. If any dispute arises over an Order, Withcott's records will be conclusive evidence of what was ordered.
- 5.2. On the placement of each Order, the Customer represents to Withcott that it is solvent and able to pay all of its debts as and when they fall due.
- 5.3. In addition to the Customer's obligations on completion of any Account Application which Withcott may require, the Customer shall inform Withcott when an Order is placed, of any material facts, which might reasonably affect any decision to accept the Order or grant credit.

6. INSTRUCTIONS/SPECIFICATIONS

- 6.1. The Customer acknowledges that, where identified on the Offer, Withcott has relied on the provision of materials and/or instructions by the Customer. In those circumstances, the Customer shall, as soon as an Order has been accepted by Withcott, provide Withcott with sufficient materials and instructions to enable Withcott to commence work. Any additional costs or expenses incurred by Withcott as a result of the Customer's delay in this regard may be added to the Price by Withcott.
- 6.2. Where specifications or other particulars are supplied by the Customer, Withcott's Offer is made on estimates of quantities required. If there are any adjustments in quantities above or below the quantities estimated by the Customer on which Withcott has based an Offer, then Withcott is entitled to revise the Price in accordance with the additional work required to supply the Goods.

7. CUSTOMER SUPPLIED SEED

- Where the Customer supplies seed to Withcott for the purpose of producing Goods for the Customer at their request, Withcott will:
- 7.1. Plant and germinate the seed and will provide the Customer with such Goods as are produced from the seed, on or about the date agreed by the parties.
 - 7.2. The Customer acknowledges that, in relation to the seed, Withcott cannot and does not guarantee:
 - 7.2.1. Such seed will meet the description on the label.
 - 7.2.2. The seed is free of disease.
 - 7.2.3. That germination will occur, either at the rate anticipated or at all.
 - 7.2.4. That the growth and vigour of seedlings will occur at the rate anticipated, or at all.
 - 7.3. Seed purchased by the Customer and supplied to Withcott for the purposes of providing the Goods will be cared for under the same quality management procedures that are applied to seed sourced by Withcott.
 - 7.4. In consideration of Withcott endeavouring to produce Goods from the seed, the Customer fully and unconditionally releases Withcott from all actions, rights, causes of action, claims or demands which the Customer may have against Withcott, its officers, employees and agents including for any loss or damage suffered by the Customer as a result of the failure of any seed supplied to Withcott by the Customer, or the inability of Withcott to provide any Goods to the Customer, irrespective of how that loss is sustained. Such loss shall include claims for loss of profits, economic loss or damages which result from any of the events described in paragraph 7.2 above. Further, this clause shall, to the extent permissible at law, apply to exclude any claims which result from an act or omission of Withcott or the negligence of Withcott in relation to the provision of the Goods or the process and procedure applied by Withcott in growing the seed.
 - 7.5. The Customer acknowledges that Withcott has relied upon this paragraph 7 in entering into any agreement with the Customer and represents and warrants that it has had the opportunity to consult with a solicitor, and that it fully understands the meaning and legal effect of this paragraph.

8. GOODS SOLD

- All Goods to be supplied by Withcott to the Customer are as described on the Offer or as otherwise confirmed in writing with the Customer by Withcott and the description on such Offer or written confirmation, prevails over all other descriptions including any specification or enquiry of the Customer.

9. CONTINUITY

- This contract contemplates that the whole of the work required to produce the Goods, or each major section thereof, shall be capable of being completed and delivered by Withcott in one Order or at one time, unless otherwise stated. Any additional expense incurred by Withcott as a result of Withcott being unable to complete or deliver the whole of the Goods or each major section of the Goods in one Order or delivery may be added to the Price by Withcott.

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10. PART ACCEPTANCE

The Offer is intended for acceptance in its entirety, notwithstanding that certain parts thereof may have been individually itemised. Should a portion only of the Offer be accepted, that portion may be subject to a revision in Price at the election of Withcott.

11. SHORTAGE

11.1. The Customer acknowledges that the supply of the Goods is subject to a number of environmental and other variable factors and to the extent that Withcott is unable to produce the number of Goods ordered for any reason which is beyond their control (save for their negligence) then the Customer shall waive any claim for shortage of any Goods delivered.

11.2. Subject to clause 11.1, in the event that the Customer has a claim in respect of short delivery, but such claim has not been lodged with Withcott within seven (7) days from the date of receipt of the Goods by the Customer then the Customer shall not be entitled to proceed with such claim.

12. PRICE

12.1. Unless otherwise stated the Price stated by Withcott is exclusive of Goods and Services Tax (GST).

12.2. Where any Price stated by Withcott includes any external costs (such as freight and insurance), those external costs are provided by Withcott on the date the Offer is made.

12.3. In the event that there is a significant variation in external costs or other matters (in excess of 5% of that component of the Offer) then Withcott may vary the Price (whether before or after acceptance by the Customer including by the placement of any Order) and the Customer shall pay the revised Price.

12.4. The Price may be revised by Withcott at any time prior to supply or despatch of the Goods.

13. PAYMENT IN FULL REQUIRED

The Price and all amounts payable to Withcott shall be paid in full and without deduction on the part of the Customer by way of set-off or counter-claim unless the Customer has received the prior written authority of Withcott.

14. WORKING HOURS

Withcott may, at its sole discretion, elect to accept or decline any Order which may (as a result of the Order or Withcott's other commitments) require it to work outside of normal requirements. Any additional costs resulting from the Customer's direction for Withcott to work outside of its normal requirements in order to supply the Goods may be added to the Price by Withcott.

15. SUB-CONTRACTING

Withcott shall be at liberty to sub-contract to third parties such parts of the work required to produce the Goods as it may, in its absolute discretion think fit, without reference to the Customer.

16. RELEASE & INDEMNITY

16.1. Save as provided in these Terms and Conditions, as indicated above, the Customer acknowledges that the production of the Goods is subject to a number of variable factors which may be beyond the control of Withcott and the Customer hereby releases Withcott from all liability and indemnifies Withcott in respect of any claim, action or suit for loss or damage (including consequential loss or damage) by reason of delay, faulty or defective materials, short supply, or (where permitted by law) any act of negligence or omission by Withcott its servants or agents in the production of the Goods.

16.2. The Customer releases Withcott and shall indemnify it against any claim which may arise from any third party in relation to the spread of disease, pests or otherwise resulting directly or indirectly from the supply of the Goods to the Customer.

17. LIMITATION OF LIABILITY

Withcott's liability for a breach of this contract, including for a breach of a condition or warranty implied by Div 2 of Pt V of the *Trade Practices Act 1974* (other than s69), is limited to:

17.1. In the case of Goods, at Withcott's sole discretion,

17.1.1. the replacement of the Goods or the supply of equivalent Goods;

17.1.2. the payment of the cost of replacing the Goods or of acquiring equivalent Goods.

17.2. In the case of Services, at Withcott's sole discretion:

17.2.1. the supplying of the services again; or

17.2.2. the payment of the cost of having the services supplied again,

17.3. Withcott will not be liable for any claim for personal injury/death caused by any act of Withcott directly or indirectly related to the supply of Goods or Services to the Customer.

18. DELIVERY

18.1. Any delivery times provided by Withcott to the Customer are estimates only and are not of the essence.

18.2. Withcott is not liable for any loss to the Customer (or other parties) resulting from late delivery or non-delivery.

18.3. Withcott may at its option deliver the Goods to the Customer in any number of shipments or instalments unless otherwise agreed in writing with the Customer.

18.4. If Withcott delivers any of the Goods by instalments, and any one of those instalments is defective for any reason:

18.4.1. it is not a repudiation of the contract;

18.4.2. the defective instalment is a severable breach that gives rise only to a claim for compensation in respect of that instalment and subject to the provisions of paragraph 20.

18.5. In the event that the Customer is unable to receive the Goods within 7 days of the date for delivery nominated by Withcott, then Withcott shall be entitled to add the additional cost of maintaining the Goods between the date nominated by Withcott and the date on which the Goods are delivered, including labour and maintenance costs, to the Price.

19. LOSS OR DAMAGE IN TRANSIT

19.1. Withcott is not responsible to the Customer or any person claiming through it for any loss or damage to the Goods in transit caused by any event, regardless of how caused (whether or not Withcott is legally responsible for the person who caused or contributed to that loss or damage).

19.2. Withcott will provide the Customer with such assistance as may be necessary to make claims on carriers so long as the Customer:

19.2.1. has notified Withcott and the carriers in writing immediately after loss or damage is discovered on receipt of the Goods; and

19.2.2. lodges a claim for compensation on the carrier within three (3) days of the date of receipt of the Goods.

20. PROPERTY AND RISK

20.1. Property in the Goods shall not pass until payment in full of the Price (and all monies owed on any basis) is made by the Customer.

20.2. Risk in the Goods shall pass to the Customer on delivery or despatch to the Customer, whichever is the first to occur.

20.3. All of the Customer's property which is left in Withcott's custody or control will be entirely at the Customer's risk as regards to loss or damage thereto from any cause whatsoever.

20.4. All property of Withcott (including in the Goods if property has not passed) situated on the Customer's premises will be the responsibility of the Customer as to loss or damage caused by the Customer.

21. TITLE TO GOODS

21.1. Withcott reserves the following rights in relation to the Goods until the Price is paid in full:

21.1.1. Ownership of the Goods;

21.1.2. To, with the full authority of the Customer, enter the Customer's property or premises (or the property or premises of any associated company or agent where the Goods are located) if necessary with the assistance of a security agent who is similarly authorised by the Customer to enter the Customer's premises (including, where necessary, by picking or breaking the Customer's locks) without liability for trespass or any resulting damage and retake possession of the Goods or any part of the Goods; and

21.1.3. To keep or resell any Goods repossessed or any Products obtained or derived from the Goods pursuant to paragraph 21.1.2 above.

21.1.4. Where the Goods are planted (and grown) by the Customer on their premises after delivery by Withcott, to require the Customer to grant to Withcott a profit a prendre over such of the Customer's property or premises onto which the Goods are planted, in a form which is capable of registration.

21.2. If the Goods are used to make new goods or Products, then the new goods or Products will be held in trust for Withcott until the Goods are paid for in full by the Customer.

21.3. If the Goods are resold, or further products manufactured or derived using the Goods, the Customer shall hold such part of the proceeds of any sale as represents the Price of the Goods in a separate identifiable account on trust for and as the beneficial property of Withcott and shall pay such amount to Withcott upon request.

21.4. Notwithstanding any provision above, Withcott shall be entitled to maintain an action against the Customer for payment of the Price.



- 22. PAYMENT TERMS**
- 22.1. All Customers are required to complete an Account Application with Withcott. The Price is payable in full on the due date which is shown on any invoice or supply agreement (which may be the date that the Customer is notified that the Goods are available for supply or despatch).
- 22.2. Any Customer who has successfully completed an Account Application with Withcott shall make payment in accordance with terms offered in writing from Withcott.
- 22.3. If Withcott grants any credit facility or nominates any credit limit on the successful completion of an Account Application that is an indication only of its intention at the time. Withcott reserves the right to vary or withdraw any credit facility at its unfettered discretion, without notice and without liability to the Customer or any other party.
- 23. OVERDUE ACCOUNTS**
- 23.1. Any part of the Price which is not paid by the Customer on the due date shall bear overdue account fee at the rate of 15% per annum (which may be waived by Withcott in its discretion), calculated on monthly balances, with no notice required to be provided to the Customer.
- 23.2. The Customer agrees to pay all legal costs, stamp duty where applicable, and any expenses incurred by Withcott in connection with recovery of amounts overdue.
- 23.3. Where requested by Withcott, the Customer agrees to charge all their equitable interest in any freehold or leasehold property where the Goods have been planted, are growing or are otherwise held by the Customer. The Customer agrees to deliver to Withcott, within seven (7) days of demand, a properly executed Memorandum of Mortgage in a form approved by Withcott which is capable of registration and which may include a covenant providing that interest may be charged on all outstanding monies, at the rate set out in paragraph 23.1 of these Terms and Conditions.
- 24. CUSTOMER'S INSOLVENCY**
- If the Customer commits (or if Withcott considers, on reasonable grounds, that the Customer is at risk of committing) an act of bankruptcy, enters into a scheme of arrangement or composition with creditors, suffers a sequestration order or, being a company, takes or has taken against it any action or proceedings which may result in the winding up of the company or is placed under official management or receivership, then Withcott may:
- 24.1. terminate the contract on the giving of 24 hours notice to the Customer in accordance with paragraph 30;
- 24.2. without limitation, exercise its rights pursuant to paragraphs 21 and 29.
- 25. CUSTOMER RESTRUCTURE**
- 25.1. The Customer will notify Withcott in writing within two (2) days of any change in its structure or management including any change in director, shareholder or change in partnership or trusteeship and/or of the sale of any part of its business. If the Customer fails to do so, or if the change is not acceptable to Withcott, it may terminate the contract immediately and the provisions of paragraph 29 of these Terms and Conditions shall then apply.
- 25.2. Both the person or entity, shown in Withcott's records as the Customer, and the person or entity operating the new business structure remain liable to Withcott for Goods supplied until Withcott has accepted an updated Account Application from the person or entity operating the new business structure.
- 25.3. Without derogation to any of Withcott's rights as set out in this paragraph 25, if the Customer fails to comply with its obligations under paragraphs 25.1 and 25.2, then the new person or entity shall be deemed to have accepted the Terms and Conditions of the contract in full and will be regarded as standing in the place or stead of the Customer.
- 25.4. If the Customer fails to observe the above terms or makes a misrepresentation to Withcott, then at the election of Withcott account facilities may be withdrawn and all charges made to the Customer's account in relation to any Goods or Services supplied by Withcott will become due immediately.
- 26. FORCE MAJEURE**
- 26.1. If for any reason beyond Withcott's control, Withcott's performance is frustrated, delayed or impeded, Withcott may notify the Customer in writing and they may cease production or supply of the Goods (at its absolute discretion) provided always that the Customer shall pay any part invoice and shall pay all charges and expenses incurred and moneys paid by Withcott in respect thereof.
- 26.2. Withcott will not be liable for any claim arising directly or indirectly from the non-delivery or delay in the delivery of Goods caused by weather, disease, industrial action, unavailability of seeds or from any unexpected cause beyond Withcott's control, directly or indirectly affecting the availability of seedlings or other goods/services.
- 27. RETURNED GOODS**
- 27.1. Withcott is not under any duty to accept Goods returned by the Customer and will do so only on terms to be agreed in writing in each individual case.
- 27.2. If Withcott agrees to accept returned Goods from the Customer under paragraph 27.1 of this clause, the Customer must return the Goods to Withcott at its place of business referred to in these terms and conditions and the Customer shall bear the cost of transit (if any) for the return of the Goods to Withcott.
- 27.3. The Customer shall be liable for any loss or deterioration in the Goods as a result of the return of same to Withcott.
- 28. CANCELLATION**
- No Order may be cancelled except with consent in writing and on terms, which will indemnify Withcott against all losses resulting from such cancellation.
- 29. TERMINATION**
- 29.1. If the Customer shall default in any of its obligations under this contract, Withcott shall have the right to determine this contract immediately upon the provision of written notice to the Customer.
- 29.2. Upon termination of the contract prior to payment of the Price in full:
- 29.2.1. all amounts due under the contract become payable forthwith;
- 29.2.2. Withcott shall be at liberty to retake possession of the Goods in respect of which property has not passed and, if necessary, to enter onto the property of the Customer in order to execute that right, in accordance with paragraph 21.
- 30. NO WAIVER**
- No relaxation by Withcott of the Customers obligations under this contract shall be regarded as a waiver of Withcott's right to enforce those obligations on a subsequent occasion.
- 31. APPLICABLE LAW**
- This contract shall be construed according to the laws of the State of Queensland and the parties submit to the jurisdiction of the Courts of Queensland.
- 32. SEVERABILITY**
- To the extent possible, any part of these Terms and Conditions may be severed without affecting any other part.
- 33. PRIVACY**
- 33.1. The Customer authorises Withcott to:
- 33.1.1. obtain information about its personal or commercial credit worthiness from a bank or any trade referee disclosed in this document and any other credit provider and credit reporting agency for the purposes of assessing the account application, or in connection with any guarantee.
- 33.1.2. use, disclose or exchange with other credit providers information about its personal or commercial credit arrangements in order to assess the account application (including whether to accept as Guarantor any person signing), monitor credit worthiness and collect overdue accounts.
- 33.1.3. disclose the contents of a credit report by a credit reporting agency to Withcott's solicitors or mercantile agents
- 33.2. Withcott is bound by and complies with the National Privacy Principles in relation to the collection and disclosure of information regarding individuals. If a Customer or Guarantor does not provide the information sought by Withcott, then Withcott may not be able to process any application.
- 33.3. Withcott will handle any personal information the Customer provides to it, in accordance with its privacy policy. Withcott's privacy policy details can be obtained from its website.