

Scheme Membership (Supplier) Agreement

Background

- A. The Gardening Responsibly Scheme (**Scheme**) is a free, voluntary, industry-led program to promote the supply and development of low invasiveness risk plants.
- B. Nursery & Garden Industry Pty Ltd (**GR**) administers the Scheme.
- C. The Supplier wishes to join the Scheme, and, subject to GR approving the Supplier's application for Scheme membership, GR agrees to admit the Supplier to the Scheme on the terms set out in this agreement.

Agreements

1. Definitions and interpretation

1.1 Definitions

- 1.1.1 Where commencing with a capital letter:

Confidential Information of a party means information of that party or provided by or on behalf of that party to the other party in any form and whether or not designated as confidential, including Personal Information;

Consequential Loss means loss of profit, loss of revenue, loss of production, loss or denial of opportunity, loss of access to markets, loss of goodwill, loss of business reputation, future reputation or publicity, damage to credit rating, loss of use, indirect loss, and any similar loss whether or not in the reasonable contemplation of the parties as at the date of this agreement;

Credentials means environmental or sustainability credentials and includes the NIASA and Ecohort credentials;

GR Mark means the mark in the schedule;

Low Risk Rating means an Official Risk Rating that corresponds to low invasiveness risk;

Official Risk Rating means a risk rating assigned to a plant by a committee (or panel thereof) tasked by GR with reviewing risk assessments on the Research Portal;

Personal Information has the meaning given to it in section 6 of the *Privacy Act 1988*;

Research Portal means the research portal on the Website;

Term has the meaning given to it in clause 2;

Territory means Australia; and

Website means <https://www.gardeningsresponsibly.org.au/>.

- 1.1.2 Where a word or phrase is given a defined meaning, another grammatical form of that word or phrase has a corresponding meaning.
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1.2 Interpretation

1.2.1 Unless the context otherwise requires:

- (a) a word that denotes:
 - (i) the singular denotes the plural and vice versa; and
 - (ii) a person includes an individual, a body corporate, an unincorporated entity and a government; and
- (b) a reference to:
 - (i) a party includes the executors, administrators and successors of the party;
 - (ii) any legislation includes any regulation or instrument made under it and any amended, re-enacted or replacement legislation;
 - (iii) a government department or statutory body includes any replacement government department or statutory body;
 - (iv) any agreement or other document includes that agreement or document as amended or replaced;
 - (v) money is to Australian dollars unless otherwise stated; and
 - (vi) any thing (including any amount) is a reference to the whole and each part.

1.2.2 In this agreement:

- (a) clause headings are for convenience only and do not affect interpretation;
- (b) “including” and its other grammatical forms are not words of limitation; and
- (c) a provision must not be construed to the disadvantage of a party for the reason that the party was responsible for the preparation of this agreement, for the inclusion or amendment of the provision in this agreement or because the party seeks to rely on the provision.

2. Term

The term of this agreement (**Term**) commences on the date the Supplier is notified in writing by GR that its application for Scheme membership has been approved and continues until terminated in accordance with this agreement.

3. Licence

Subject to this agreement, GR grants the Supplier a non-exclusive, non-transferable, royalty free licence to use the GR Mark in relation to plants in the Territory during the Term.

4. Supplier acknowledgment

The Supplier acknowledges that the Official Risk Rating of a plant may change as new evidence of plant traits and behaviour emerges and that it must regularly check the Research Portal to satisfy itself of the currency of an Official Risk Rating previously assigned to a plant through the Research Portal.

5. Supplier obligations

5.1 Prohibitions

The Supplier must not, during or after the Term:

- a) grant a sublicense to use the GR Mark to any person;
 - b) represent in any way that the Supplier owns the GR Mark or is entitled to use the GR Mark other than as a licensee of GR;
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- c) make any statement in relation to the GR Mark which is unauthorised or misleading;
- d) use any trade mark that is substantially identical with or deceptively similar to the GR Mark;
- e) damage GR's reputation or goodwill or the reputation or goodwill of the GR Mark;
- f) alter the GR Mark or produce or present the GR Mark in an altered form without the prior written consent of GR;
- g) use the GR Mark in the place of any of the Supplier's trade marks;
- h) use the GR Mark in conjunction with any trade mark of the Supplier such that the GR Mark appears to be a part of, or combined with, another trade mark; or
- i) use the GR Mark in a manner that is misleading or deceptive or is likely to mislead or deceive.

5.2 Use of GR Mark

Unless instructed otherwise by GR, the Supplier must:

- (a) use the GR Mark:
 - (i) only in relation to plants that have been assigned a Low Risk Rating through the Research Portal; and
 - (ii) in compliance with any requirements that may be prescribed in any certification scheme notified by GR in writing to the Supplier; and
- b) where a plant has had its Official Risk Rating modified through the Research Portal so that it is no longer a Low Risk Rating, cease using the GR Mark in relation to that plant as soon as reasonably practicable, and, in any event, within seven days of the relevant Official Risk Rating being modified.

5.3 Other obligations

The Supplier must:

- (a) regularly check the Research Portal to ensure that the Supplier's use of the GR Mark reflects Low Risk Ratings that are current;
 - (b) at its cost, give GR:
 - (i) all assistance;
 - (ii) documentation and records;
 - (iii) access to all relevant equipment, locations, areas, personnel and the Supplier's subcontractors,reasonably required by GR for the purpose of reviewing the performance of the Supplier of its obligations under this agreement;
 - (c) if the Supplier chooses to use a marketing kit template to apply the GR Mark to its plants, do so at the Supplier's own expense;
 - (d) take all steps as are reasonable in the circumstances:
 - (i) to explain to the Supplier's staff and customers:
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- (1) the concept of invasive risk; and
- (2) the benefits of acquiring plants that have a low invasiveness risk; and
- (ii) to inform the Supplier's staff and customers of the Supplier's involvement in the Scheme;
- (e) to promptly inform GR of:
 - (i) any Credentials attained by the Supplier; and
 - (ii) any change to the Supplier's existing Credentials (if any);
- (f) use best endeavours to proactively increase the number and varieties of plants that are eligible for marketing using the GR Mark; and
- (g) comply with all applicable laws (including all biosecurity and environment laws and any laws prohibiting the sale of specified plants).

6. Infringement

6.1 Supplier to inform GR

The Supplier must immediately inform GR of:

- (a) any infringement of the GR Mark by a third party; and
- (b) any legal action or administrative procedure, pending or threatened, in relation to the GR Mark.

6.2 Legal action to be at GR's discretion

The Supplier agrees that:

- (a) any legal or other action necessary for the purpose of protecting the GR Mark is at the sole discretion of GR; and
- (b) GR is not liable for any damages, losses, costs or expenses suffered by the Supplier in connection with third party infringement of the GR Mark.

7. Liability

7.1 Exclusion

To the extent permissible by law, GR's liability is as expressly stated in this agreement and all other liability is excluded.

7.2 Limitation of liability

If statutory consumer guarantees or implied terms apply to the supply of services in connection with this agreement, to the extent permitted by statute, GR's liability for any breach of those consumer guarantees or implied terms is limited to provision of the services again.

7.3 Exclusion from liability

To the extent permissible by law, GR's liability for Consequential Loss, including if caused or contributed to by GR's negligence, is excluded.

8. Indemnity

The Supplier indemnifies GR against all damages, losses, costs and expenses incurred by GR arising out of:

- (a) any breach by the Supplier of its obligations under this agreement; and
- (b) any act or omission of the Supplier in connection with the use of the GR Mark.

9. Confidentiality

9.1 Maintenance and return

Each party must during and after the Term:

- (a) keep the Confidential Information of the other party confidential and not disclose it to any third party without the other party's prior written consent;
- (b) use the Confidential Information of the other party only as contemplated by this agreement; and
- (c) on reasonable request from the other party and on termination of this agreement, return all Confidential Information of the other party to the other party and permanently delete from all computer systems under the party's control all that Confidential Information.

9.2 Exclusions

9.2.1 The obligations of a party under clause 9.1 do not apply to any Confidential Information:

- (a) that was in the party's possession at the time of disclosure to the party and was not acquired in breach of or under an obligation of confidence;
- (b) that is in the public domain other than as a result of breach of this agreement;
- (c) that was acquired from a third party, provided that it was not acquired by the third party unlawfully or in breach of or under an obligation of confidence;
- (d) that was independently developed by the party, its employees or its contractors who did not have access to the other party's Confidential Information; or
- (e) to the extent that it is required to be disclosed by law.

9.2.2 Nothing in this clause 4 derogates from any obligation that a party may have under any privacy laws.

10. Dispute resolution

10.1 Disputes

10.1.1 Subject to clause 10.1.4, during and after the Term the parties must, without delay and in good faith, attempt to resolve any dispute in connection with this agreement (**Dispute**) prior to commencing any proceedings.

10.1.2 If a party requires resolution of a Dispute it must do so in accordance with this clause 10. Compliance with this clause 10 is a condition precedent to any entitlement to claim relief or remedy, whether by way of proceedings in a court of law or otherwise in respect of such Disputes.

10.1.3 The existence of a Dispute or the commencement of proceedings does not affect the obligation of the parties to continue to perform their obligations under this agreement.

10.1.4 This clause 10 does not apply to applications for urgent injunctive or urgent interlocutory relief.

10.2 Notice of dispute

10.2.1 If a party requires resolution of a Dispute, it must immediately submit full details of the Dispute to the other party.

10.2.2 If the Dispute is not resolved within 30 days after submission of the Dispute to them, or such other time as the parties agree in writing, the provisions of clause 10.3 will apply.

10.3 Mediation

10.3.1 The parties must submit and participate in mediation of the Dispute in accordance with and subject to the Resolution Institute's Mediation Rules.

10.3.2 The mediation is to be conducted by a mediator appointed by agreement of the parties or, failing agreement within 14 days or such other time as the parties agree in writing, by a mediator appointed by the Resolution Institute.

10.3.3 A party may not commence proceedings in respect of the Dispute unless the Dispute is not settled within 7 days after the mediation has taken place or such other time as the parties agree in writing.

11. Termination

11.1 Termination by Supplier

Either party may terminate this agreement at any time by giving seven days' written notice to the other party.

11.2 Termination for default

GR may, by notice to the Supplier, terminate this agreement if the Supplier:

- a) goes into liquidation, has a receiver or receiver and manager appointed to it or any part of its assets, enters into a scheme of arrangement with creditors or suffers any other form of external administration;
- b) fails, within 14 days after receipt of notice, to remedy any breach of its obligations under this agreement that are capable of remedy;
- c) breaches any of its obligations under this agreement that are not capable of remedy;
- d) persistently breaches its obligations under this agreement; or
- e) ceases to carry on its business in relation to plants.

11.3 Effect of termination

Upon termination of this agreement, the Supplier:

- (a) as soon as possible, and, in any event, within 14 days of termination, must cease all use of the GR Mark; and
- (b) will be delisted from the “Find a Supplier” page of the Website.

12. Notices

12.1 Delivery

A notice under this agreement must be in writing and may be given to the addressee by:

- a) delivering it to the address of the addressee;
- b) sending it by registered post to the address of the addressee; or
- c) sending it to the email address of the addressee.

12.2 Receipt

A notice given under clause 12.1 is deemed to have been received:

- (a) if delivered, at the time of delivery;
- (b) if sent by registered post, on the 3rd day after posting; or
- (c) if sent by email, on the day it is sent, unless the sender receives a bounce-back indicating the email has not reached the mailbox of the addressee.

13. Miscellaneous

13.1 Entire agreement

13.1.1 This agreement embodies the entire understanding and agreement between the parties as to its subject matter.

13.1.2 All previous negotiations, understandings, representations, warranties, documents or commitments in relation to, or in any way affecting, the subject matter of this agreement are merged in and superseded by this agreement.

13.2 Further assurance

Each party must promptly sign all documents and do all things that the other party reasonably requests to effect, perfect or complete this agreement and all transactions incidental to it.

13.3 Assignment

The Supplier must not assign any of its rights or novate any of its obligations under this agreement without the prior written consent of GR.

13.4 Waiver

A waiver under this agreement is not binding on a party unless it is in writing and signed by the party. A waiver is not a waiver of any other right.

13.5 Variation

A variation of this agreement must be in writing and signed by the parties.

13.6 Severance

Each of the agreements of the parties under this agreement is severable from the others and the severance of one agreement does not affect the other agreements.

13.7 Relationship

Except as expressly stated in this agreement:

- (a) nothing in this agreement creates an agency, partnership, joint venture or employment relationship between the parties or any of their respective employees, agents or contractors; and
- (b) neither party nor any person acting on behalf of a party may hold themselves out as being entitled to contract or accept payment in the name of or on account of the other party.

13.8 Governing law and jurisdiction

13.8.1 This agreement is governed by and must be construed in accordance with the laws of New South Wales.

13.8.2 Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of New South Wales and all courts that have jurisdiction to hear appeals from those courts and waives any right to object to proceedings being brought in those courts for any reason.

Schedule

