

My Gardens Pty Ltd – Terms & Conditions of Trade

1. **Definitions**
 - 1.1 "Landscape" shall mean My Gardens Pty Ltd its successors and assigns or any person acting on behalf of and with the authority of My Gardens
 - 1.2 "Client" shall mean the Client (or any person acting on behalf of and with the authority of the Client) as described on any quotation, work authorisation or other form as provided by the Landscaper to the Client.
 - 1.3 "Guarantor" means that person (or persons), or entity, who agrees to be liable for the debts of the Client on a principal debtor basis.
 - 1.4 "Goods" shall mean Goods supplied by the Landscaper to the Client (and where the context so permits shall include any supply of Services as hereinafter defined) and are as described on the invoices, quotation, work authorisation or any other forms as provided by the Landscaper to the Client.
 - 1.5 "Services" shall mean all Services supplied by the Landscaper to the Client and includes any advice or recommendations (and where the context so permits shall include any supply of Goods as defined above).
 - 1.6 "Price" shall mean the price payable for the Goods as agreed between the Landscaper and the Client in accordance with clause 4 of this contract.
2. **The Commonwealth Trade Practices Act 1974 ("TPA") and Fair Trading Acts ("FTA")**
 - 2.1 Notwithstanding that it is intended to have the effect of contracting out of any applicable provisions of the TPA or the FTA in each of the States and Territories of Australia, except to the extent permitted by those Acts where applicable.
3. **Acceptance**
 - 3.1 Any instructions received by the Landscaper from the Client for the supply of Goods and/or the Client's acceptance of Goods supplied by the Landscaper shall constitute acceptance of the terms and conditions contained herein.
 - 3.2 Where more than one Client has entered into this agreement, the Clients shall be jointly and severally liable for all payments of the Price.
 - 3.3 Upon acceptance of these terms and conditions by the Client the terms and conditions are binding and can only be amended with the written consent of the Landscaper.
 - 3.4 The Client shall give the Landscaper not less than fourteen (14) days prior written notice of any proposed change of ownership of the Client or any change in the Client's name and/or any other change in the Client's details (including but not limited to, changes in the Client's address, facsimile number, or business practice). The Client shall be liable for any loss incurred by the Landscaper as a result of the Client's failure to comply with this clause.
 - 3.5 Goods are supplied by the Landscaper only on the terms and conditions of trade herein to the exclusion of anything to the contrary in the terms of the Client's order notwithstanding that any such order is placed on terms that purport to override these terms and conditions of trade.
4. **Price And Payment**
 - 4.1 At the Landscaper's sole discretion the Price shall be either:
 - (a) as indicated on invoices provided by the Landscaper to the Client in respect of Goods supplied; or
 - (b) the Landscaper's current price at the date of delivery of the Goods according to the Landscaper's current Price list; or
 - (c) the Landscaper's quoted Price (subject to clause 4.2) which shall be binding upon the Landscaper provided that the Client shall accept the Landscaper's quotation in writing within thirty (30) days.
 - 4.2 The Landscaper reserves the right to change the Price in the event of a variation to the Landscaper's quotation. Any variation from the plan of scheduled works or specifications (including, but not limited to, any variation as a result of additional works required due to hidden or unidentifiable difficulties beyond the reasonable control of the Landscaper such as hard rock barriers below the surface or iron reinforcement rods in concrete or as a result of increases to the Landscaper in the cost of materials and labour) will be detailed in writing and charged for on the basis of the Landscaper's quotation and will be shown as variations on the invoice. Payment for all variations must be made in full at their time of completion.
 - 4.3 At the Landscaper's sole discretion a deposit may be required.
 - 4.4 At the Landscaper's sole discretion:
 - (a) payment shall be due on delivery of the Goods; or
 - (b) payment shall be due before delivery of the Goods; or
 - (c) payment for approved Clients shall be made by instalments in accordance with the Landscaper's payment schedule.
 - 4.5 Time for payment for the Goods shall be of the essence and will be stated on the invoice or any other forms. If no time is stated then payment shall be due seven (7) days following the date of the invoice.
 - 4.6 The Landscaper may submit a detailed payment claim at intervals not less than one month for work performed up to the end of each month. The value of work so performed shall include the reasonable value of authorised variations and the value of materials deliverable to the site but not yet installed.
 - 4.7 Payment will be made by cash, or by cheque, or by bank cheque, or by credit card (plus a surcharge of up to three (3%) of the Price), or by direct credit, or by any other method as agreed to between the Client and the Landscaper.
 - 4.8 GST and other taxes and duties that may be applicable shall be added to the Price except when they are expressly included in the Price.
5. **Delivery Of Goods**
 - 5.1 At the Landscaper's sole discretion delivery of the Goods shall take place when:
 - (a) the Client takes possession of the Goods at the Landscaper's address; or
 - (b) the Client takes possession of the Goods at the Client's nominated address (in the event that the Goods are delivered by the Landscaper or the Landscaper's nominated carrier).
 - 5.2 At the Landscaper's sole discretion the costs of delivery are:
 - (a) included in the Price; or
 - (b) for the Client's account.
 - 5.3 The Client shall make all arrangements necessary to take delivery of the Goods whenever they are tendered for delivery. In the event that the Client is unable to take delivery of the Goods as arranged then the Landscaper shall be entitled to charge a reasonable fee for redelivery.
 - 5.4 Delivery of the Goods to a third party nominated by the Client is deemed to be delivery to the Client for the purposes of this agreement.
 - 5.5 The Landscaper may deliver the Goods by separate instalments. Each separate instalment shall be invoiced and paid in accordance with the provisions in these terms and conditions.
 - 5.6 The Client shall take delivery of the Goods tendered notwithstanding that the quantity so delivered shall be either greater or lesser than the quantity purchased provided that:
 - (a) such discrepancy in quantity shall not exceed five percent (5%); and
 - (b) the Price shall be adjusted pro rata to the discrepancy.
 - 5.7 The failure of the Landscaper to deliver shall not entitle either party to treat this contract as repudiated.
 - 5.8 The Landscaper shall not be liable for any loss or damage whatsoever due to failure by the Landscaper to deliver the Goods (or any of them) promptly or at all, where due to circumstances beyond the control of the Landscaper.
6. **Risk**
 - 6.1 If the Landscaper retains ownership of the Goods nonetheless, all risk for the Goods passes to the Client on delivery.
 - 6.2 If any of the Goods are damaged or destroyed following delivery but prior to ownership passing to the Client, the Landscaper is entitled to receive all insurance proceeds payable for the Goods. The production of these terms and conditions by the Landscaper is sufficient evidence of the Landscaper's rights to receive the insurance proceeds without the need for any person dealing with the Landscaper to make further enquiries.
- 6.3 Where the Client expressly requests the Landscaper to leave Goods outside the Landscaper's premises for collection or to deliver the Goods to an unattended location then such Goods shall be left at the Client's sole risk and it shall be the Client's responsibility to ensure the Goods are insured adequately or at all.
7. **Access**
 - 7.1 The Client shall ensure that the Landscaper has clear and free access to the work site at all times to enable them to undertake the works. The Landscaper shall not be liable for any loss or damage to the site (including, without limitation, damage to pathways, driveways and concreted or paved or grassed areas) unless due to the negligence of the Landscaper.
8. **Underground Locations**
 - 8.1 Prior to the Landscaper commencing any work the Client must advise the Landscaper of the precise location of all underground services on the site and clearly mark the same. The underground mains & services the Client must identify include, but are not limited to, electrical services, gas services, sewer services, pumping services, sewer connections, sewer sludge mains, water mains, irrigation pipes, telephone cables, fibre optic cables, oil pumping mains, and any other services that may be on site.
 - 8.2 Whilst the Landscaper will take all care to avoid damage to any underground services the Client agrees to indemnify the Landscaper in respect of all any liability claims, loss, damage, costs and fines as a result of damage to services not precisely located and notified as per clause 8.1.
9. **Title**
 - 9.1 The Landscaper and the Client agree that ownership of the Goods shall not pass until:
 - (a) the Client has paid the Landscaper all amounts owing for the particular Goods; and
 - (b) the Client has met all other obligations due by the Client to the Landscaper in respect of all contracts between the Landscaper and the Client.
 - 9.2 Receipt by the Landscaper of any form of payment other than cash shall not be deemed to be payment until that form of payment has been honoured, cleared or recognised and until then the Landscaper's ownership or rights in respect of the Goods shall continue.
 - 9.3 It is further agreed that:
 - (a) where practicable the Goods shall be kept separate and identifiable until the Landscaper shall have received payment and all other obligations of the Client are met; and
 - (b) until such time as ownership of the Goods shall pass from the Landscaper to the Client the Landscaper may give notice in writing to the Client to return the Goods or any of them to the Landscaper. Upon such notice the rights of the Client to obtain ownership or any other interest in the Goods shall cease; and
 - (c) the Landscaper shall have the right of stopping the Goods in transit whether or not delivery has been made; and
 - (d) if the Client fails to return the Goods to the Landscaper then the Landscaper or the Landscaper's agent may enter upon and into land and premises owned, occupied or used by the Client, or any premises as the invitee of the Client, where the Goods are situated and take possession of the Goods; and
 - (e) the Client is only a bailee of the Goods and until such time as the Landscaper has received payment in full for the Goods then the Client shall hold any proceeds from the sale or disposal of the Goods, up to and including the amount the Client owes to the Landscaper for the Goods, on trust for the Landscaper; and
 - (f) the Client shall not deal with the money of the Landscaper in any way which may be adverse to the Landscaper; and
 - (g) the Client shall not charge the Goods in any way nor grant nor otherwise give any interest in the Goods while they remain the property of the Landscaper; and
 - (h) the Client can issue proceedings to recover the Price of the Goods sold notwithstanding that ownership of the Goods may not have passed to the Client; and
 - (i) until such time that ownership in the Goods passes to the Client, if the Goods are converted into other products, the parties agree that the Landscaper will be the owner of the end products.
10. **Defects**
 - 10.1 The Client shall inspect the Goods on delivery and shall within seven (7) days of delivery (time being of the essence) notify the Landscaper of any alleged defect, shortage in quantity, damage or failure to comply with the description or quote. The Client shall afford the Landscaper a reasonable time to inspect the Goods within a reasonable time following delivery if the Client believes the Goods are defective in any way. If the Client shall fail to comply with these provisions the Goods shall be presumed to be free from any defect or damage. For defective Goods, which the Landscaper has agreed in writing that the Client is entitled to reject, the Landscaper's liability is limited to either (at the Landscaper's discretion) replacing the Goods or repairing the Goods except where the Client has acquired Goods as a consumer within the meaning of the Trade Practices Act 1974 (Cwlth) or the Fair Trading Acts of the relevant state or territories of Australia, and is therefore also entitled to, at the consumer's discretion either a refund of the purchase price of the Goods, or repair of the Goods, or replacement of the Goods.
 - 10.2 Goods will not be accepted for return other than in accordance with 10.1 above.
11. **Warranty**
 - 11.1 To the extent permitted by statute, no warranty is given by the Landscaper as to the quality or suitability of the Goods for any purpose and any implied warranty, is expressly excluded. The Landscaper shall not be responsible for any loss or damage to the Goods, or caused by the Goods, or any part thereof however arising.
12. **Intellectual Property**
 - 12.1 Where the Landscaper has designed, drawn or written Goods for the Client, then the copyright in those designs and drawings and documents shall remain vested in the Landscaper, and shall only be used by the Client at the Landscaper's discretion.
 - 12.2 The Client warrants that all designs or instructions to the Landscaper will not cause the Landscaper to infringe any patent, registered design or trademark in the execution of the Client's order and the Client agrees to indemnify the Landscaper against any action taken by a third party against the Landscaper in respect of any such infringement.
13. **Default & Consequences of Default**
 - 13.1 Interest on overdue invoices shall accrue daily from the date when payment becomes due, until the date of payment, at a rate of two and one half percent (2.5%) per calendar month (and at the Landscaper's sole discretion such interest shall compound monthly at such a rate) after as well as before any judgment.
 - 13.2 In the event that the Client's payment is dishonoured for any reason the Client shall be liable for any disbursement fees incurred by the Landscaper.
 - 13.3 If the Client defaults in payment of any invoice when due, the Client shall indemnify the Landscaper from and against all costs and disbursements incurred by the Landscaper in pursuing the debt including legal costs on a solicitor and own client basis and the Landscaper's collection agency costs.
 - 13.4 Without prejudice to any other remedies the Landscaper may have, if at any time the Client is in breach of any obligation (including those relating to payment), the Landscaper may suspend or terminate the supply of Goods to the Client and any of its other obligations under the terms and conditions. The Landscaper will not be liable to the Client for any loss or damage the Client suffers because the Landscaper has exercised its rights under this clause.
 - 13.5 If any account remains overdue after thirty (30) days then an amount of the greater of twenty dollars (\$20.00) or ten percent (10%) of the amount overdue (up to a maximum of two hundred dollars (\$200.00)) shall be levied for administration fees which sum shall become immediately due and payable.
- 13.6 Without prejudice to the Landscaper's other remedies at law the Landscaper shall be entitled to cancel all or any part of any order of the Client which remains unfulfilled and all amounts owing to the Landscaper shall, whether or not due for payment, become immediately payable in the event that:
 - (a) any money payable to the Landscaper becomes overdue, or in the Landscaper's opinion the Client will be unable to meet its payments as they fall due; or
 - (b) the Client becomes insolvent, convenes a meeting with its creditors or proposes or enters into an arrangement with creditors, or makes an assignment for the benefit of its creditors; or
 - (c) a receiver, manager, liquidator (provisional or otherwise) or similar person is appointed in respect of the Client or any asset of the Client.
14. **Security And Charge**
 - 14.1 Despite anything to the contrary contained herein or any other rights which the Landscaper may have howsoever:
 - (a) where the Client and/or the Guarantor (if any) is the owner of land, realty or any other asset capable of being charged, both the Client and/or the Guarantor agree to mortgage and/or charge all of their joint and/or several interest in the said land, realty or any other asset to the Landscaper or the Landscaper's nominee to secure all amounts and other monetary obligations payable under these terms and conditions. The Client and/or the Guarantor acknowledge and agree that the Landscaper (or the Landscaper's nominee) shall be entitled to lodge where appropriate a caveat, which caveat shall be withdrawn once all payments and other monetary obligations payable hereunder have been met.
 - (b) should the Landscaper elect to proceed in any manner in accordance with this clause and/or its sub-clauses, the Client and/or Guarantor shall indemnify the Landscaper from and against all the Landscaper's costs and disbursements including legal costs on a solicitor and own client basis.
 - (c) the Client and/or the Guarantor (if any) agree to irrevocably nominate constitute and appoint the Landscaper or the Landscaper's nominee as the Client's and/or Guarantor's true and lawful attorney to perform all necessary acts to give effect to the provisions of this clause 14.1.
15. **Cancellation**
 - 15.1 The Landscaper may cancel any contract to which these terms and conditions apply or cancel delivery of Goods at any time before the Goods are delivered by giving written notice to the Client. On giving such notice the Landscaper shall repay to the Client any sums paid in respect of the Price. The Landscaper shall not be liable for any loss or damage whatsoever from such cancellation.
 - 15.2 In the event that the Client cancels delivery of Goods the Client shall be liable for any loss incurred by the Landscaper (including, but not limited to, any loss of profits) up to the time of cancellation.
16. **Privacy Act 1988**
 - 16.1 The Client and/or the Guarantor/s agree for the Landscaper to obtain from a credit reporting agency a credit report containing personal credit information about the Client and Guarantor/s in relation to credit provided by the Landscaper.
 - 16.2 The Client and/or the Guarantor/s agree that the Landscaper may exchange information about the Client and the Guarantor/s with those credit providers either named as trade referees by the Client or named in a consumer credit report issued by a credit reporting agency for the following purposes:
 - (a) to assess an application by Client; and/or
 - (b) to notify other credit providers of a default by the Client; and/or
 - (c) to exchange information with other credit providers as to the status of this credit account, where the Client is in default with other credit providers; and/or
 - (d) to assess the credit worthiness of Client and/or Guarantor/s.
 - 16.3 The Client consents to the Landscaper being given a consumer credit report to collect overdue payment on commercial credit (Section 18K(1)(h) Privacy Act 1988).
 - 16.4 The Client agrees that personal credit information provided may be used and retained by the Landscaper for the following purposes and for other purposes as shall be agreed between the Client and Landscaper or required by law from time to time:
 - (a) provision of Goods; and/or
 - (b) marketing of Goods by the Landscaper, its agents or distributors in relation to the Goods; and/or
 - (c) analysing, verifying and/or checking the Client's credit, payment and/or status in relation to provision of Goods; and/or
 - (d) processing of any payment instructions, direct debit facilities and/or credit facilities requested by Client; and/or
 - (e) enabling the daily operation of Client's account and/or the collection of amounts outstanding in the Client's account in relation to the Goods.
 - 16.5 The Landscaper may give information about the Client to a credit reporting agency for the following purposes:
 - (a) to obtain a consumer credit report about the Client; and/or
 - (b) allow the credit reporting agency to create or maintain a credit information file containing information about the Client.
17. **Building and Construction Industry Payments Act 2004**
 - 17.1 At the Landscaper's sole discretion, if there are any disputes or claims for unpaid Goods and/or Services then the provisions of the Building and Construction Industry Payments Act 2004 may apply.
 - 17.2 Nothing in this agreement is intended to have the effect of contracting out of any applicable provisions of the Building and Construction Industry Payments Act 2004 of Queensland, except to the extent permitted by the Act where applicable.
18. **General**
 - 18.1 If any provision of these terms and conditions shall be invalid, void, illegal or unenforceable the validity, existence, legality and enforceability of the remaining provisions shall not be affected, prejudiced or impaired.
 - 18.2 These terms and conditions and any contract to which they apply shall be governed by the laws of Queensland and are subject to the jurisdiction of the courts of Queensland.
 - 18.3 The Landscaper shall be under no liability whatsoever to the Client for any indirect and/or consequential loss and/or expense (including loss of profit) suffered by the Client arising out of a breach by the Landscaper of these terms and conditions.
 - 18.4 In the event of any breach of this contract by the Landscaper the remedies of the Client shall be limited to damages which under no circumstances shall exceed the Price of the Goods.
 - 18.5 The Client shall not be entitled to set off against, or deduct from the Price, any sums owed or claimed to be owed to the Client by the Landscaper nor to withhold payment of any invoice because part of that invoice is in dispute.
 - 18.6 The Landscaper may license or sub-contract all or any part of its rights and obligations without the Client's consent.
 - 18.7 The Client agrees that the Landscaper may review these terms and conditions at any time. If, following any such review, there is to be any change to these terms and conditions, then that change will take effect from the date on which the Landscaper notifies the Client of such change.
 - 18.8 Neither party shall be liable for any default due to any act of God, war, terrorism, strike, lock-out, industrial action, fire, flood, storm or other event beyond the reasonable control of either party.
 - 18.9 The failure by the Landscaper to enforce any provision of these terms and conditions shall not be treated as a waiver of that provision, nor shall it affect the Landscaper's right to subsequently enforce that provision.