

Rules Governing the Use of a Certification Trade Mark

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Recitals

- A. Two of APFIP's key objects are to:
- (i) develop and promote independent evaluation of pome fruit propagation material for the Australian pome fruit industry; and
 - (ii) develop and promote standards for pome fruit propagation material that will assist the international competitiveness of the Australian pome fruit industry.
- B. The Trade Mark is to be used by APFIP and Approved Users to indicate that, amongst other matters, Trees and Rootstocks bearing Certification Tags have been assessed by APFIP as being Trees and Rootstocks which:
- (i) are True to Type;
 - (ii) have been grown and maintained in specified and controlled conditions;
 - (iii) have been tested as negative for the Viruses;
 - (iv) are able to be traced back to its Nuclear Stock Tree; and
 - (v) have tested negative for the Pests and Diseases;
- and, consequently, are more likely to result in increased orchard productivity than trees and Rootstocks not so certified.
- C. The use of the Trade Mark is governed by these Rules.

Rules

1. Definitions and Interpretation

1.1 Definitions

In these Rules:

“**Act**” means the *Trade Marks Act 1995 (Cth)*;

“**APFIP**” means the Australian Pome Fruit Improvement Program Limited ACN 077 345 174;

“**Approved User**” means a nursery or other similar organisation involved in propagating varieties and Rootstocks of *Malus*, *Pyrus* or *Cydonia* and which satisfies APFIP that, pursuant to clause 6, it meets the Approved User Requirements;

“**Approved User Requirements**” means the requirements set out in Schedule 5;

“Bundle” means a bundle of 50 Certified Vegetatively Propagated Rootstocks or Certified Seedling Rootstocks;

“Business Day” means a day on which banks are open for business in Melbourne, Victoria;

“Certification Tag” means a tag issued by APFIP in the form as APFIP shall determine from time to time and which bears the Trade Mark;

“Certified” means;

- (a) (subject to clause 5) in respect of Trees, Trees which have been produced in accordance with Schedule 2;
- (b) in respect of Vegetatively Propagated Rootstocks, Vegetatively Propagated Rootstocks which have been produced in accordance with Schedule 3;
- (c) in respect of Seedling Rootstocks, Seedling Rootstocks which have been produced in accordance with Schedule 4; and
- (d) in respect of Rootstocks, both Certified Seedling Rootstocks and Certified Vegetatively Propagated Rootstocks;

“Financial Statement” means a statement of financial position and a statement of financial performance;

“Licence” means a non-exclusive licence granted by APFIP to an Approved User to use the Trade Mark on Certification Tags and on substantially similar terms and conditions as set out in Annexure “A”;

“Nuclear Stock Trees” means Trees which have been produced and maintained in accordance with item 2.2 of Schedule 2;

“PBR Descriptions” means plant variety descriptions as recorded from time to time on the register maintained by the Department of Agriculture, Fisheries and Forestry Australia;

“Pests and Diseases” means the following pests and diseases:

- (a) apple and pear scab (*Venturia inaequalis*, *Venturia nashicola*);
- (b) powdery mildew (*Podosphaeria leucotricha*);
- (c) woolly apple aphid (*Eriosoma lanigerum*); and
- (d) such other pests and diseases specified in writing by APFIP from time to time;

“**Phytosanitary Regulations**” means the laws relating to Australian import regulations and post entry quarantine protocols as are in place from time to time;

“**Propagation Stock Tees**” means Trees which have been produced and maintained in accordance with item 2.3 of Schedule 2;

“**Rootstock**” means a plant of the species *Malus*, *Pyrus* or *Cydonia* onto which Scion/Budwood is grafted or budded and includes both Vegetatively Propagated Rootstocks and Seedling Rootstocks;

“**Scion/Budwood**” means, in relation to plant varieties of the species *Malus*, *Pyrus* or *Cydonia*, any part or product from which, whether alone or in combination with other parts or products of that plant, another plant with the same essential characteristics of the variety can be produced;

“**Seedling Rootstocks**” means rootstocks which are introduced, maintained, produced and sold in accordance with Schedule 4;

“**Trade Mark**” means the certification trade mark which is the subject of Australian trade mark application number 964237;

“**Tree**” means a tree which is produced from successfully grafting or budding Scion/Budwood onto Rootstock;

“**True to Type**” means a method used by APFIP to determine whether one generation of Tree or Rootstock is substantially similar the previous generation of that Tree or Rootstock as set out in Schedule 6;

“**Vegetatively Propagated Rootstock**” means rootstock which has been multiplied by an asexual process and are introduced, maintained, propagated and sold in accordance with Schedule 3; and

“**Virus**” means one of either *apple chlorotic leaf spot trichovirus*, *apple mosaic ilarvirus*, *apple stem-grooving capillovirus* or *apple stem pitting foveavirus*.

1.2 Interpretation

In these Rules:

- (a) headings are inserted for convenience only and do not affect the interpretation of these Rules; and

unless the context otherwise requires:

- (b) words importing the singular include the plural and vice versa;
- (c) a word importing a gender includes the other gender;

- (d) a reference to a person includes an individual, a partnership, a body corporate, a joint venture, an association (whether incorporated or not), a government and a government authority or agency;
- (e) a reference to a clause is a reference to a clause of these Rules;
- (f) a reference to these Rules includes the recitals and any schedules, annexures, exhibits or attachments to these Rules;
- (g) a reference to legislation includes any statutory modification or replacement and any subordinate or delegated legislation issued under such legislation;
- (h) if the day on which anything is to be done is not a Business Day it shall be done on the next Business Day; and
- (i) a reference to "\$" or dollars means Australian dollars and a reference to payment means payment in Australian dollars.

2. **Property in the Trade Mark**

The Trade Mark is the absolute property of APFIP and shall not be used by any person other than with the express written authority of APFIP.

3. **Use of the Trade Mark**

- 3.1 Only APFIP or Approved Users may use the Trade Mark.
- 3.2 APFIP may use the Trade Mark in accordance with these Rules.
- 3.3 Pursuant to clause 6, a person may apply to become an Approved User and may be authorised by the grant of a Licence by APFIP to use the Trade Mark in accordance with these Rules and the Licence.
- 3.4 The Trade Mark shall only be used by Approved Users on Certification Tags and in association with Certified Trees or Certified Rootstocks.
- 3.5 Subject to clause 3.6, Approved Users shall only use Certification Tags which are purchased from APFIP:
 - (a) in respect of Certified Trees, on a one Certification Tag per Certified Tree basis; or
 - (b) in respect of Certified Rootstocks, on a one Certification Tag per Bundle basis.
- 3.6 An Approved User shall only use a Certification Tag in association with the particular Tree or Bundle in respect of which the Certification Tag was issued.

- 3.7 A request to purchase a Certification Tag shall be accompanied by a signed declaration in a form prescribed by APFIP from time to time detailing the Approved User's right to produce, reproduce, propagate and sell the Certified Trees or Rootstocks.
- 3.8 A Certification Tag shall only be issued by APFIP to an Approved User if APFIP, at its sole and unfettered discretion, is satisfied that the Approved User is not in breach of the *Plant Breeder's Rights Act (Cth) 1994*.
- 3.9 Where a Certified Tree or Certified Rootstock has been propagated by the Licensee, the Trade Mark shall, at all times, be accompanied by a statement that Certified Trees and Certified Rootstocks have been propagated by the Approved User.
- 3.10 Section 26 of the Act does not apply.

4. **Production of Certified Trees and Certified Rootstocks**

- 4.1 Subject to clause 5, Certified Trees shall only be produced and sold by APFIP and/or an Approved User in accordance with Schedule 2.
- 4.2 Certified Vegetatively Propagated Rootstocks shall only be produced and sold by APFIP and/or an Approved User in accordance with Schedule 3.
- 4.3 Certified Seedling Rootstocks shall only be produced and sold by APFIP and/or an Approved User in accordance with Schedule 4
- 4.4 For clarification purposes, the relationship between Schedules 2, 3 and 4 has been visually represented in Schedule 1.

5. **Production otherwise than in accordance with Schedule 2**

- 5.1 In the event that an Approved User wishes to produce or sell Certified Trees otherwise than as prescribed by items 2.4.1 or 2.5 of Schedule 2, the Approved User shall:
- (a) notify APFIP as to how it intends to produce or sell Certified Trees differently as prescribed by items 2.4.1 or 2.5 of Schedule 2; and
 - (b) request APFIP's written consent that it is authorised to produce or sell Certified Trees in the manner that it intends as set out in clause 5.1(a).
- 5.2 APFIP may, at its sole and unfettered discretion and subject to any conditions that it sees fit, consent to the Approved User producing or selling Certified Trees in the manner set out in clause 5.1(a).
- 5.3 The Approved User shall only producing or selling Certified Trees otherwise than as prescribed by items 2.4.1 or 2.5 of Schedule 2 if APFIP has given its written consent to do so in accordance with clause 5.2.

6. Application for Approved User Status

6.1 An application to APFIP for Approved User status shall be made in writing and be addressed to:

C/- The National Coordinator
Australian Pome Fruit Improvement Program Limited
35 Fourteen Turn Creek Road
Grove Tasmania 7109

6.2 An application made pursuant to clause 6.1 shall include:

- (a) written material giving information about the applicant and evidence that the applicant meets the Approved User Requirements, including a complete set of Financial Statements (in a form reasonably agreed to by APFIP) relating to the applicant as at the preceding 30 June or 31 December (whichever is the later); and
- (b) written references from at least three industry/business referees which substantiate that the applicant meets the Approved User Requirements.

6.3 Where APFIP requires more information or evidence in relation to the application provided pursuant to clause 6.2, the applicant shall provide the required information or evidence to APFIP.

6.4 As soon as practicable, APFIP shall confirm receipt of the application and arrange, at a mutually convenient time, for an inspection by APFIP or its authorised representatives of the premises on which the Trees and Rootstocks are to be selected, maintained, propagated and sold for the purpose of APFIP determining whether the applicant meets the Approved User Requirements.

6.5 As soon as practicable, APFIP shall notify the applicant in writing whether APFIP is satisfied that the applicant meets the Approved User Requirements.

6.6 If APFIP is satisfied that the applicant meets the Approved User Requirements, APFIP shall grant a Licence to the applicant and the applicant shall be deemed to be an Approved User and the Approved User may use the Trade Mark in accordance with the Licence and be eligible to purchase Certification Tags from APFIP in accordance with clause 3.

6.7 If APFIP is not satisfied that the applicant meets Approved User Requirements, APFIP shall notify the applicant of the reasons why it is not so satisfied.

6.8 An unsuccessful applicant for Approved User status may make another application pursuant to this clause.

6.9 A Licence will normally be granted for five years, but a licence for a period other than five years may be granted by APFIP at its sole and unfettered discretion.

6.10 APFIP shall use its reasonable endeavours to keep any confidential information that it receives pursuant to this clause confidential.

7. **Record Keeping**

7.1 An Approved User is required to keep records in accordance with Schedule 13.

7.2 The records kept by an Approved User in accordance with Schedule 13 shall be provided to APFIP by no later 30 July of each year during the term of the Licence.

8. **Monitoring and Auditing the Use of the Trade Mark**

8.1 Upon giving reasonable notice to an Approved User, APFIP or its representatives may, from time to time and during the term of the Licence, conduct random inspections to ensure that an Approved User is using the Trade Mark exclusively in association with Certified Trees and Certified Rootstocks and in accordance with the Licence.

8.2 In the event that APFIP is not satisfied that the Trade Mark is being used exclusively in association with Certified Trees and/or Certified Rootstocks (as the case may be), APFIP shall notify the Approved User of the result of its inspection and the Approved User shall, within 14 days of such notification, ensure, to the satisfaction of APFIP, that the Trade Mark is being used exclusively in association with Certified Trees and/or Certified Rootstocks (as the case may be).

8.3 Where APFIP is still not satisfied that the Trade Mark is being used exclusively in association with Certified Trees and/or Certified Rootstocks (as the case may be), the Licence shall terminate and the Approved User shall cease being an Approved User.

9. **Termination or Expiry of Licence**

9.1 Upon termination or expiry of a Licence, the former licensee shall:

- (a) cease to use the Trade Mark in any way (including, but not limited to, ceasing to distribute or sell Trees and/or Rootstocks with Certification Tags); and
- (b) either destroy or return to APFIP all relevant packaging bearing the Trade Mark, including, but not limited to, all Certification Tags which have previously been issued.

10. **Amendment of the Rules**

Subject to the Act, APFIP may alter these Rules at any time and at its absolute discretion.

11. Dispute Resolution

Where there is a dispute between the parties arising:

- (a) from a refusal by APFIP to certify Rootstocks or Trees;
- (b) from a refusal by APFIP to allow the use of the Trade Mark; or
- (c) from the construction, termination or breach of these Rules;

then such dispute shall, unless resolved within 21 days from the date on which notice of the dispute is given by a party, be referred for mediation in accordance with the *Mediation and Conciliation Rules* for the time being of the Institute of Arbitrators & Mediators of Australia at the request of any party to the dispute, to:

- (a) a mediator agreed on by the parties to the dispute; or
- (b) if the parties to the dispute are unable to agree on a mediator within seven days of the expiry of such notice, a mediator appointed by the then current President of the Law Institute of Victoria or a person of an equivalent position at an equivalent organisation of another State as determined by APFIP in its sole and unfettered discretion;

provided that the mediation is commenced within seven days of the referral or such later time as agreed by the parties to the dispute.

12. Warranty and Certification

12.1 APFIP warrants that, to the best of its knowledge and belief, Certified Trees and/or Certified Rootstocks are more likely to result in increased orchard productivity than Trees and Rootstocks not so certified.

12.2 APFIP warrants that it will use its reasonable endeavours to ensure that Trees and Rootstocks which are tested and treated for the Viruses in accordance with these Rules are tested and treated by what APFIP considers to be the latest virus testing and treatment procedures and processes available at that time.

12.3 The Trade Mark does not certify and APFIP does not warrant that :

- (a) Certified Trees and/or Certified Rootstocks:
 - (i) are free of the Viruses or any other viruses; and
 - (ii) are free of the Pests and Diseases or any other pests and diseases; and

(b) use of any trees, Rootstocks and/or Scion/Budwood is in any way compliant with or authorised under any law including, but not limited, to the *Plant Breeder's Rights Act* (Cth) 1994 or the Phytosanitary Regulations.

12.4 APFIP shall, to the maximum extent permitted by law, not be liable to the Approved User or any other party for any damage, loss or injury caused as a result of the use of any product (including but not limited to Trees and Rootstocks).

13. **Jurisdiction**

These Rules shall be governed by and construed in accordance with the laws of Victoria and the parties hereby submit to the exclusive jurisdiction of Victorian courts and any courts which have jurisdiction to hear appeals from any of those courts.

14. **Severability**

If any provision of these Rules is invalid or not enforceable in accordance with its terms in any jurisdiction, it is to be read down for the purposes of that jurisdiction, if possible, so as to be valid and enforceable and shall otherwise be capable of being severed to the extent of the invalidity or unenforceability without affecting the remaining provisions of these Rules or affecting the validity or enforceability of that provision in any other jurisdiction.

15. **Further Assurances**

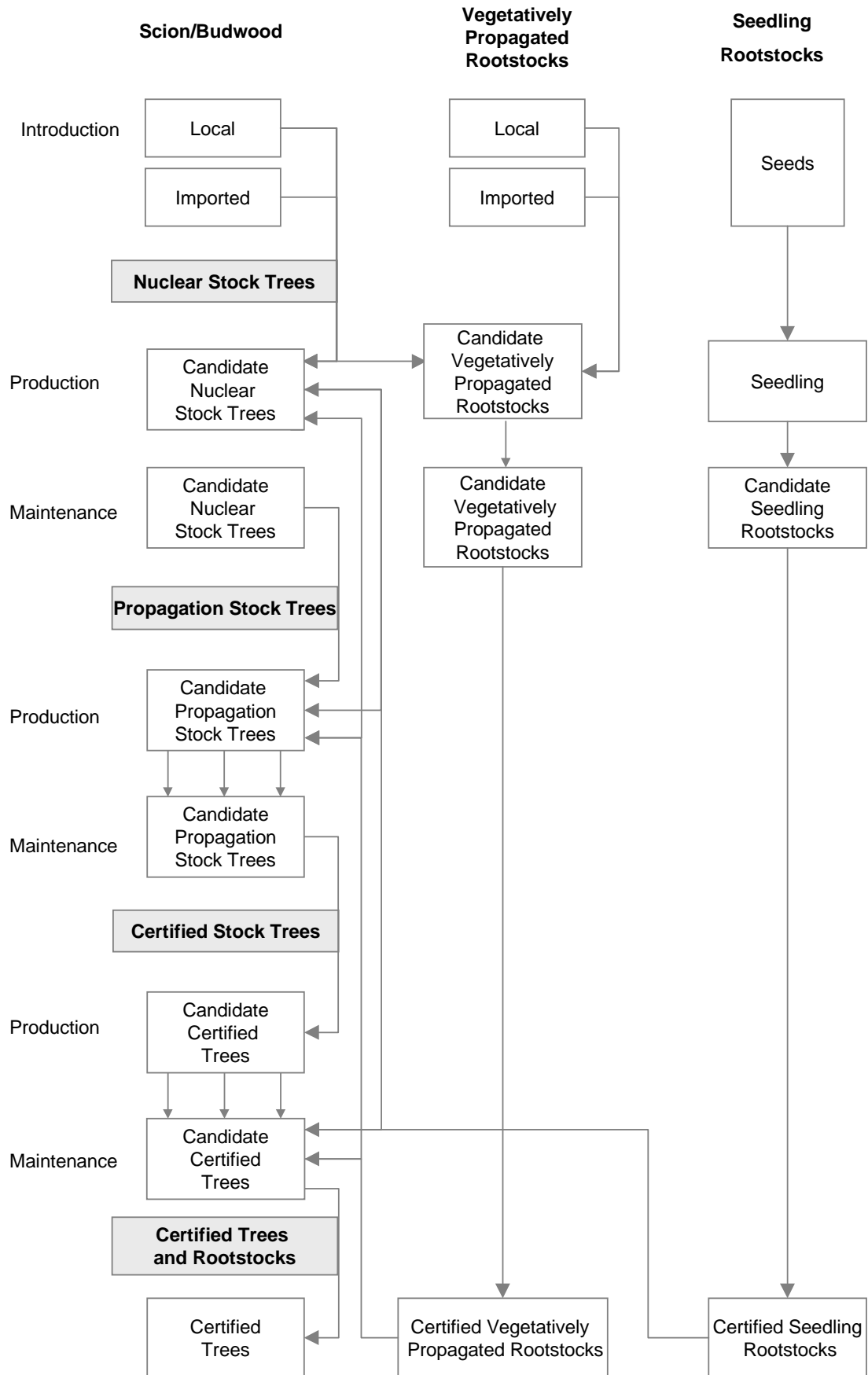
The Approved User shall sign, execute, deliver and do and shall procure that each of its officers, employees and agents signs, executes, delivers and does, all deeds, documents, instruments and acts reasonably required of it or them by notice from another party to effectively carry out and comply with these Rules and the rights and obligations of the parties under it.

16. **Costs**

16.1 APFIP and the Approved User shall pay its own costs and expenses in respect of the any negotiation, preparation, execution, delivery and stamping of any documents and for any service or obligation contemplated by these Rules.

16.2 In particular, and without limiting the generality of clause 16.1, the Approved User shall be responsible for all costs and expenses associated in any way with testing and treatment of the Viruses or the Pests and Diseases.

SCHEDULE 1



SCHEDULE 2

Introduction, Maintenance, Production and Selling of Certified Trees

This schedule sets out the steps and procedures necessary to produce and sell Certified Trees.

2.1 Introduction of Scion/Budwood

Only Scion/Budwood which is sourced in accordance with items 2.1.1 or 2.1.2 shall be used to produce candidate Nuclear Stock Trees in accordance with item 2.2.1.

2.1.1 Scion/Budwood sourced from local trees

Scion/Budwood may be sourced directly from a fruiting tree which has been grown in Australia and which:

- (a) has been selected from an orchard and/or from pomological field trials within Australia;
- (b) has tested as negative for each of the Viruses in accordance with Schedule 10;
- (c) has been assessed by APFIP as being True to Type; and

where candidate Nuclear Stock Trees are to be produced by an Approved User, that Approved User has sent to APFIP details of:

- (i) the geographic location of the original tree; and
- (ii) the Approved User's right to use, produce, reproduce, propagate, sell and import the Scion/Budwood.

2.1.2 Direct Importation of Scion/Budwood sourced from imported foreign trees

Scion/Budwood may be sourced from a tree which has been imported into Australia and which:

- (a) has met the Phytosanitary Regulations;
- (b) has been tested as negative for each of the Viruses in accordance with Schedule 10;
- (c) has been assessed by APFIP as being True to Type; and

where candidate Nuclear Stock Trees are to be produced by an Approved User, that Approved User has sent to APFIP details of:

- (i) the geographic location of the imported tree; and
- (ii) the Approved User's right to produce, reproduce, propagate, sell and import the Scion/Budwood.

2.2 Production of Nuclear Stock Trees

Only candidate Nuclear Stock Trees which are produced in accordance with item 2.2.1 and maintained in accordance with item 2.2.3 shall qualify as Nuclear Stock Trees and be used to produce candidate Propagation Stock Trees in accordance with item 2.3.1.

2.2.1 Production of candidate Nuclear Stock Trees

- (a) Candidate Nuclear Stock Trees shall only be produced by budding or grafting Scion/Budwood which has been introduced in accordance with either item 2.1.1 or item 2.1.2 onto:
 - (i) Certified Vegetatively Propagated Rootstocks; or
 - (ii) Certified Seedling Rootstocks.
- (b) Candidate Nuclear Stock Trees must:
 - (i) test negative for each of the Viruses in accordance with Schedule 10; and
 - (ii) during the period of Virus testing, be grown in and kept under conditions specified in Schedule 11.
- (c) If a candidate Nuclear Stock Tree tests positive for any one of the Viruses, the candidate Nuclear Stock Tree may only be promoted to Nuclear Stock Tree status and be maintained in accordance with item 2.3 if the infected candidate Nuclear Stock Tree undergoes Virus Treatment in accordance with item 2.2.2.
- (d) Notwithstanding the above if, in the opinion of either APFIP or an Approved User, it is possible that all candidate Nuclear Stock Trees are infected with any one of the Viruses, APFIP or the Approved User may omit the testing procedure outlined at item 2.2.1(b) and proceed directly to the treatment procedure outlined at item 2.2.2.

2.2.2 Treatment of Candidate Nuclear Stock Trees

- (a) A candidate Nuclear Stock Tree which tests positive for any one of the Viruses under item 2.2.1(c) is to be Virus treated in accordance with Schedule 9.
- (b) A candidate Nuclear Stock Tree which is Virus treated in accordance with Schedule 9 may only be maintained in accordance with item 2.2.3 and

subsequently qualify as a Nuclear Stock Tree if the candidate Nuclear Stock Tree:

- (i) has tested negative for each of the Viruses after one full growing season in accordance with Schedule 10; and
- (ii) during the period of Virus testing, has been grown in and kept under conditions set out in Schedule 11.

2.2.3 Maintenance of candidate Nuclear Stock Trees

A candidate Nuclear Stock Tree may only qualify as a Nuclear Stock Tree and be used to produce candidate Propagation Stock Trees in accordance with item 2.3, if it has been:

- (a) inspected for the presence of the Pests and Diseases and, if Pests and Diseases are detected, treated in accordance Schedule 12; and
- (b) grown in and kept under the conditions specified in Schedule 11.

2.3 Production of Propagation Stock Trees

Only candidate Propagation Stock Trees which are produced in accordance with item 2.3.1 and maintained in accordance with item 2.3.2 shall qualify as Propagation Stock Trees and be used to produce candidate Certified Trees in accordance with item 2.4.1.

2.3.1 Production of candidate Propagation Stock Trees

- (a) Candidate Propagation Stock Trees may only be produced by budding or grafting Scion/Budwood obtained from Nuclear Stock Trees onto:
 - (i) Certified Vegetatively Propagated Rootstocks; or
 - (ii) Certified Seedling Rootstocks.
- (b) Nuclear Stock Trees are to be multiplied in as few steps as possible to obtain the required quantity of candidate Propagation Stock Trees.
- (c) The volume of Scion/Budwood to be taken from each Nuclear Stock Tree in accordance with item 2.3.1(a) is to be recorded in accordance with item (d) of Schedule 13.

2.3.2 Maintenance of candidate Propagation Stock Trees

- (a) Subject to items (b), (c), (d) and (e), below, a candidate Propagation Stock Tree may only qualify as a Propagation Stock Tree and be used to produce candidate Certified Trees in accordance with item 2.4.1, if it has:

- (i) been grown in and kept under conditions specified by Schedule 11;
 - (ii) been Virus indexed in accordance with Schedule 14;
 - (iii) been inspected for the presence of Pests and Diseases and, if Pests and Diseases are detected, treated in accordance with Schedule 12;
 - (iv) fruited;
 - (v) been able to be traced back to its Nuclear Stock Tree; and
 - (vi) been assessed as being True to Type by APFIP in accordance with Schedule 6.
- (b) The origin of each candidate Propagation Stock Tree shall be verified, recorded and registered with APFIP in accordance with Schedule 13.
- (c) A candidate Propagation Stock Tree which tests positive for a Virus shall not be used to produce Propagation Stock Trees and shall immediately be removed from any lots which contain candidate Propagation Stock Trees
- (d) If there is an indication that Virus infection in a candidate Propagation Stock Tree has derived from its parent tree, no candidate Propagation Stock Tree which has been derived from that same parent tree shall be used as a Propagation Stock Tree.
- (e) A candidate Propagation Stock Tree which is assessed by APFIP as not being True to Type shall not be used as a Propagation Stock Tree.

2.4 Production of Certified Trees

Only candidate Certified Trees which are produced in accordance with item 2.4.1 and maintained in accordance with item 2.4.2 shall qualify as a Certified Tree and be sold in accordance with item 2.5.

2.4.1 Production of candidate Certified Trees

- (a) Candidate Certified Trees shall only be produced by grafting or budding Scion/Budwood obtained from Propagation Stock Trees onto:
- (i) Certified Seedling Rootstocks; or
 - (ii) Certified Vegetatively Propagated Rootstocks.
- (b) Budding or grafting of the Scion/Budwood onto the Rootstock should be between 100mm and 200mm from the ground.

2.4.2 Maintenance of candidate Certified Trees

A candidate Certified Tree shall only qualify as a Certified Tree and be sold in accordance with item 2.5, if it has :

- (a) been grown in and kept under conditions specified by Schedule 11;
- (b) been inspected for the presence of the Pests and Diseases and, if Pests or Diseases are detected, treated in accordance with Schedule 12; and
- (c) not been treated with any chemicals to accelerate defoliation of leaves other than low biuret urea and copper formulations (hand stripping of leaves can occur, but only on the growing tips).

2.5 Selling Certified Trees

Subject to clause 5 of these Rules, a Certified Tree shall not be sold unless the Certified Tree:

- (a) meets the minimum Certified Tree requirements as set out in Schedule 7;
- (b) has minimal damage from mechanical harvest or other operations;
- (c) has a minimum height of 1.6 metres measured from the ground;
- (d) has a minimum caliper size (trunk diameter) of 12 mm measured 100mm above the graft/bud union;
- (e) has been left with a root system following lifting that can adequately support the tree with, where possible, the main roots a minimum of 150mm in length;
- (f) is free of residual soil;
- (g) is bundled and transported in order to:
 - (i) prevent damage; and
 - (ii) ensure that tree roots remain damp;
- (h) has been treated for Pests and Diseases in accordance with item 12.2 of Schedule 12; and
- (i) has no visual symptoms of the Pests and Diseases.

SCHEDULE 3

Introduction, Maintenance, Production and Selling of Certified Vegetatively Propagated Rootstocks

This schedule sets out the steps and procedures necessary to produce and sell Certified Vegetatively Propagated Rootstocks.

3.1 Introduction of Vegetatively Propagated Rootstocks

Only Vegetatively Propagated Rootstocks which have been introduced as candidate Vegetatively Propagated Rootstocks in accordance with item 3.1.1 or item 3.1.2 may be used to produce candidate Certified Vegetatively Propagated Rootstocks in accordance with item 3.3.1.

3.1.1 Candidate Vegetatively Propagated Rootstocks sourced from local trees or production beds

Subject to item 3.2, a candidate Vegetatively Propagated Rootstock which is selected from local rootstock production beds (or, in the case of the species *Cydonia*, trees) may be used to produce candidate Certified Vegetatively Propagated Rootstocks in accordance with item 3.3.1. if it is:

- (a) in the opinion of APFIP or an Approved User, from healthy-looking, vigorous and well-rooted individual trees or trees which are grown in production beds or, in the case of the species *Cydonia*, trees;
- (b) individually tested as negative for each of the Viruses in accordance with Schedule 10;
- (c) assessed by APFIP as being True to Type; and

where the candidate Vegetatively Propagated Rootstock is to be produced by an Approved User, that Approved User must send to APFIP details of:

- (i) the geographic location of the original tree; and
- (ii) the Approved User's right to produce, reproduce, propagate, sell and import the candidate Vegetatively Propagated Rootstock.

3.1.2 Direct Importation of Candidate Vegetatively Propagated Rootstocks

Subject to item 3.2, a candidate Vegetatively Propagated Rootstock which is selected and imported into Australia may only be used to produce candidate Certified Vegetatively Propagated Rootstocks in accordance with item 3.3.1 if it is:

- (a) individually tested as negative for each of the Viruses in accordance with Schedule 10;
- (b) assessed by APFIP as being True to Type; and
- (c) meets the Phytosanitary Regulations; and

where the candidate Vegetatively Propagated Rootstock is to be produced by an Approved User, the Approved User must send to APFIP details of:

- (i) the geographic location of the original tree; and
- (ii) the Approved User's right to produce, reproduce, propagate, sell and import the candidate Vegetatively Propagated Rootstock.

3.2 Treatment of candidate Vegetatively Propagated Rootstocks

- (a) A candidate Vegetatively Propagated Rootstock which tests positive for any one of the Viruses under item 3.1.1 or item 3.1.2 is to be Virus treated in accordance with Schedule 9.
- (b) A candidate Vegetatively Propagated Rootstock which is treated in accordance with Schedule 9 may only be used to produce candidate Certified Vegetatively Propagated Rootstocks in accordance with item 3.3.1 if it:
 - (i) has tested negative for each of the Viruses after one growing season in accordance with Schedule 10; and
 - (ii) during the period of Virus testing, has been grown in and kept under conditions set out in Schedule 11.

3.3 Production of Certified Vegetatively Propagated Rootstocks

Only candidate Certified Vegetatively Propagated Rootstocks which are produced in accordance with item 3.3.1 and maintained in accordance with item 3.3.2 shall qualify as Certified Vegetatively Propagated Rootstocks and be sold in accordance with item 3.5.

3.3.1 Production of candidate Certified Vegetatively Propagated Rootstocks

A candidate certified Vegetatively Propagated Rootstock shall only be produced if it has been:

- (a) multiplied in as few steps as possible using conventional rootstock production techniques, including stooling, layering, tissue culture and nurse rooting (provided that such rooting is completed by using Certified Rootstocks) to produce candidate Vegetatively Propagated Rootstock production areas;

- (b) virus indexed in accordance with Schedule 14;
- (c) grown in and kept under conditions specified in Schedule 11; and
- (d) A candidate Certified Vegetatively Propagated Rootstock in which a Virus is detected:
 - (i) shall not be used as a Certified Vegetatively Propagated Rootstock in accordance with item 3.4(a);
 - (ii) shall be removed from any lots which contain candidate Certified Vegetatively Propagated Rootstocks; and

any other candidate certified Vegetatively Propagated Rootstock which has been grown within a 5 metre radius of the infected Rootstock shall also be removed.

3.3.2 Maintenance of Vegetatively Propagated Rootstocks

- (a) A candidate Certified Vegetatively Propagated Rootstock shall only qualify as a Certified Vegetatively Propagated Rootstock and be used in accordance with item 3.4, if it has been:
 - (i) grown in and kept under conditions specified in Schedule 11;
 - (ii) visually inspected during each growing season for the Viruses; and
 - (iii) visually inspected for Pests and Diseases and if Pests and Diseases are detected, treated in accordance with Schedule 12.
- (b) A candidate Certified Vegetatively Propagated Rootstock in which a Virus is detected:
 - (i) shall not be used as a Certified Vegetatively Propagated Rootstock in accordance with item 3.4(a);
 - (ii) shall be removed from any lots which contain candidate Certified Vegetatively Propagated Rootstocks; and

any other candidate certified Vegetatively Propagated Rootstock which has been grown within a 5 metre radius of the infected Rootstock shall also be removed.

3.4 Use of Certified Vegetatively Propagated Rootstocks

- (a) Certified Vegetatively Propagated Rootstocks may be:
 - (i) used to produce:

- (A) Candidate Nuclear Stock Trees in accordance with item 2.2.1 of Schedule 2;
 - (B) Candidate Propagation Stock Trees in accordance with item 2.4 of Schedule 2; or
 - (C) Candidate Certified Trees in accordance with item 2.4.1 of Schedule 2;
- (ii) used to produce candidate Certified Vegetatively Propagated Rootstocks in accordance with item 3.3.1; or
 - (iii) sold as a Certified Vegetatively Propagated Rootstock in accordance with item 3.5.

3.5 Selling Certified Vegetatively Propagated Rootstocks

- (a) A Certified Vegetatively Propagated Rootstock shall not be sold by APFIP or an Approved User until it meets the conditions set out in Schedule 8.
- (b) Certified Vegetatively Propagated Rootstocks shall be bundled and transported to prevent damage and to ensure that roots remain damp.

SCHEDULE 4

Introduction, Maintenance, and Production of Certified Seedling Rootstocks

This schedule sets out the procedures necessary to produce and sell Certified Seedling Rootstocks.

- (a) Only Seedling Rootstocks which meet the criteria set out in items (b) – (g) shall qualify as a Certified Seedling Rootstock.
- (b) Seeds of Malus, Pyrus or Cydonia may be introduced by APFIP or an Approved User.
- (c) Seeds are to be selected from a known source, and the source recorded.
- (d) Seed germination is to occur in fresh soil not previously used for pome fruit propagation.
- (e) The Seedling Rootstock must be grown to a suitable size for budding or grafting.
- (f) Seedling Rootstocks are to be approved for Trueness to Type by APFIP in accordance with item 6.2 of Schedule 6.
- (g) Any Seedling Rootstocks which are assessed as not being True to Type shall qualify as Certified Seedling Rootstock Status.
- (h) Certified Seedling Rootstocks may be:
 - (A) used to produce:
 - (i) candidate Nuclear Stock Trees in accordance with item 2.2.1 of Schedule 2;
 - (ii) candidate Propagation Stock Trees in accordance with item 2.3.1 of Schedule 2; or
 - (iii) candidate Certified Trees in accordance with item 2.4.1 of Schedule 2; or
 - (B) sold as Certified Seedling Rootstock in accordance with items (i) and (j).
- (i) A Certified Seedling Rootstock shall not be sold by APFIP or an Approved user until it meets the conditions as set out in Schedule 8.
- (j) When sold, Certified Seedling Rootstocks must be bundled and transported to prevent damage and to ensure that the roots remain damp.

SCHEDULE 5

Approved User Requirements

A nursery or other similar organisation must be able to demonstrate, to the satisfaction of APFIP, that it:

- (a) has the capacity (including, but not limited to adequate property, premises, plant, personnel, equipment, stock or other facilities), skill and expertise to meet all of the requirements set out in the Rules and, in particular, to select, maintain and produce Certified Trees and Rootstocks;
- (b) has at least 10 years experience in the commercial pome fruit nursery industry with particular expertise in nursery tree and rootstock production or, where it does not have at least 10 years experience in the commercial pome fruit nursery industry, have exceptional expertise in nursery tree and rootstock production;
- (c) has an integrated orchard management system;
- (d) has a demonstrated commitment to ongoing improvement of nursery production systems;
- (e) has a commercially sound business plan or business operation;
- (f) has a clear and demonstrated vision of the medium to long term that shows a *bona fide* commitment to the Australian pome fruit industry which is consistent with the goals and aspirations of APFIP;
- (g) is not in default under a decree, or a by-law or regulation of any government, statutory, municipal body or organisation having jurisdiction over the nursery and is compliant and will continue to be compliant in all material respects with and not in breach of all relevant laws (including, but not limited to, the *Plant Breeder's Rights Act 1994 (Cth)*); and
- (h) holds all licences, permits, authorisations, and consents required for the conduct of all aspects of its business, and to the best of its knowledge, all such licences, permits and authorisations as required are in full force and effect.

SCHEDULE 6

Trueness to Type

Trueness to Type refers to a method used by APFIP for determining whether one generation of tree or Rootstock is substantially similar to its previous generation.

6.1 Trees

An assessment by APFIP of varietal Trueness to Type in respect of Trees will be based on the description of fruit from the original Tree.

- (a) Where PBR Descriptions are available, PBR Descriptions shall form the basis of the assessment.
- (b) Where PBR Descriptions do not exist, the following parameters will be used by APFIP as a reference:
 - (i) growth habit (upright, spreading, weeping);
 - (ii) tree vigour (weak, medium, strong, very strong);
 - (iii) fruiting habit (tip bearing, lateral bearing, semi-spur, spur);
 - (iv) leaf colour (grey green, green, deep green);
 - (v) leaf size (small, moderate, large);
 - (vi) fruit shape (flat, flat-round, round, round-conical, conical, long-conical, round-oblong, square-oblong);
 - (vii) fruit over colour (none, cream, yellow, green, brown, orange, pink, pinkish-red, red, maroon, purple);
 - (viii) background colour (cream, yellow, yellow-green, green);
 - (ix) colour type (solid, blushed, bicoloured);
 - (x) stripe/streak (not present, partial, prominent);
 - (xi) lenticels (prominent, not prominent);
 - (xii) russet (free, partial, heavy, complete);
 - (xiii) fruit size (small, medium, large, very large);
 - (xiv) average fruit weight (grams);

- (xv) average fruit pressure (kg/m³);
- (xvi) average fruit brix (% total soluble solids); and
- (xvii) pest and disease tolerance or susceptibility.

6.2 Vegetatively Propagated Rootstocks and Seedling Rootstocks

An assessment by APFIP of Trueness to Type in respect of Rootstocks will be based on the following parameters:

- (i) growth habit (upright, spreading, weeping);
- (ii) tree vigour (weak, medium, strong, very strong);
- (iii) appearance of branching (filiform);
- (iv) internode length (short, medium, long, very long);
- (v) roots (brittle);
- (vi) leaf size (small, medium, large, very large);
- (vii) variety compatibility;
- (viii) disease tolerance / susceptibility;
- (ix) multiplication techniques (layer beds, cuttings); and
- (x) the presence or absence of spines.

SCHEDULE 7

Specific Certified Tree Requirements

In addition to the requirements set out in item 2.5 of Schedule 2, each Certified Tree must meet the following minimum specifications before being sold. These specifications are dependent on the age of the tree and on the age of the Rootstock and the Scion/Budwood used to produce the Certified Tree.

7.1 One year old Certified Tree where both the Rootstock and the Scion/Budwood are at least one year old

Trees are to be straight.

7.2 Two year old Certified Tree with a Rootstock which is at least two years old and Scion/Budwood which is at least one year old

- (a) Three branches distributed evenly around the tree.
- (b) The lowest branch is to be a minimum of 700mm from the ground; this may vary according to the growing characteristics of the variety.
- (c) Branches are to meet the “three to one” rule (that is, branches must have a diameter of no more than 30% of the trunk diameter).

7.3 Two year old Certified Tree where both the Rootstock and the Scion/Budwood are at least two years old

- (a) Six branches distributed evenly around the tree.
- (b) The lowest branch is to be a minimum of 800mm from the ground; this may vary according to the growing characteristics of the variety.
- (c) Branches are to meet the “three to one” rule (that is, branches must have a diameter of no more than 30% of the trunk diameter).

SCHEDULE 8

Minimum Certified Rootstock Requirements

8.1 General

For the purpose of this schedule:

1. The diameter of a Rootstock is to be measured 200mm from the base of the Rootstock once harvested.
2. There are two Rootstock size ranges:
 - (a) Rootstocks which are smaller than 10mm in diameter are considered liner size and planted for one growing season before budding or grafting; or
 - (b) Rootstocks which are over 10mm and less than 15mm are considered graftable size can be used for grafting in the year of harvest.

8.2 Minimum Specifications

The following minimum specifications must be met before Certified Rootstocks may be sold:

- (a) Rootstocks are to be inspected for any sign of damage or disease. Rootstocks with more than 50mm of damaged bark are to be discarded.
- (b) Rootstocks are to be straight and:
 - (i) in respect of graftable size Rootstocks, free of spines to a minimum height of 450mm; or
 - (ii) in respect of liner size Rootstocks, free of spines for the entire length of the liner size Rootstock.
- (c) The base of the tree is to be inspected to ensure there is no major damage from harvesting; it should be a clean cut.
- (d) A small root system should be present on all Rootstocks, ideally with roots growing from a minimum of three plant nodes.
- (e) The minimum length for liner size Rootstocks is 250mm and 400mm for graftable size Rootstocks.

SCHEDULE 9

Virus Treatment Procedure

Trees and Rootstocks shall be treated for each of the Viruses by a virus treating organisation approved by APFIP from time to time at APFIP's sole and unfettered discretion.

In determining whether to approve a virus treating organisation, APFIP may consider whether the organisation, in APFIP's sole and unfettered discretion, is an organisation with the required skill, expertise and experience to treat the Viruses using the latest virus treatment techniques reasonably available from time to time.

APFIP shall use all reasonable endeavours to ensure that the virus treating organisation shall disclose results of the treatment to APFIP or an Approved User.

SCHEDULE 10

Virus Testing Procedure

Trees and Rootstocks shall be tested as negative for each of the Viruses by a virus testing organisation approved by APFIP from time to time at APFIP's sole and unfettered discretion.

In determining whether to approve a virus testing organisation APFIP may consider whether the organisation, in APFIP's sole discretion, is an organisation with the required skill, expertise, and experience to test for the presence of each of the Viruses using the latest virus testing procedures reasonably available from time to time.

APFIP shall use all reasonable endeavours to ensure that the virus testing organisation shall disclose results of the treatment to APFIP or an Approved User.

SCHEDULE 11

Tree Segregation and Soil History Requirements

11.1 Trees and Rootstocks

Trees and Rootstocks are to be separated at all times from non Nuclear Stock and non Propagation Stock Trees:

- (a) by a minimum of 30 metres; or
- (b) where a barrier that prevents root penetration exists, 10 metres.

11.2 Soil History

Field grown Rootstocks and Trees are to be grown in soil that has not hosted plants of the species *Malus*, *Pyrus* or *Cydonia* in the previous six years.

If pots are to be used at any time to grow Rootstocks and Trees, the soil medium is to be sterilised.

SCHEDULE 12

Testing and Treatment for Pests and Diseases

- 12.1 Visual inspection for the Pests and Diseases and other pests and diseases are to be carried out at regular intervals. Any infections are to be recorded.
- 12.2 If visual inspection reveals that a Pest or Disease is present in a Tree or Rootstock, the infected Tree or Rootstock shall be treated by a recognisable agronomic treatment for the diagnosed Pests and Diseases until such time as the Pests and Diseases are no longer evident. Such treatment may include, but not be limited to, treatment by chemicals which have been registered for the purpose of eliminating the diagnosed Pests or Diseases.
- 12.3 Records of infections and any corrective action which is taken are to be made available in accordance with Schedule 13.

SCHEDULE 13

Records

Approved Users are required to keep records which are organised and maintained in such a way that the following information can be readily supplied to APFIP:

- (a) The location (within the nursery premises) of any Nuclear Stock Trees, Propagation Stock Trees and Certified Trees.
- (b) The parentage of the Scion/Budwood and/or Rootstocks.
- (c) The requirements set by Schedules 2, 3 and 4, as applicable, have been met.
- (d) The volume of Scion/Budwood collected from each Propagation Stock Tree.
- (e) The lifting date of Certified Trees and the records of grading. Certified Trees are to be graded separately from non certified trees.
- (f) Storage records of Certified Trees and/or Rootstocks. Certified Trees and/or Rootstocks are to be segregated from non-certified plants in storage areas.
- (g) Delivery records demonstrating that Certified Trees and Certified Rootstocks are to be sold in accordance with the conditions specified in Schedules 2, 3 and 4.
- (h) Observations of Pests and Diseases along with corrective actions specified in Schedule 12.
- (i) Results of the virus indexing undertaken in accordance with Schedule 14.
- (j) Virus Treatment Records.
- (k) Locations of original trees.
- (l) Details of the Approved User's right to produce, reproduce, propagate, sell or import the Tree or Rootstock.
- (m) Certified Tree tag orders and records of placement on certified Trees and Rootstocks

SCHEDULE 14

Virus Indexing

This schedule sets out the frequency for which Trees and Rootstocks are to be tested for each of the Viruses in accordance with Schedule 10.

14.1 Trees

Trees are to be indexed so that all trees of the same generation are tested in accordance with Schedule 10 at least once in a five year period.

14.2 Rootstocks

Rootstocks are to be indexed so that all Rootstocks of the same generation are to be tested in accordance with Schedule 10 at a rate of one in every 2,000 Rootstocks of the same generation.

The annual sampling sites are to be marked and recorded. Samples are to be taken in a grid system across the production beds.

ANNEXURE A

**Certification Trade Mark
Licence Agreement**

AUSTRALIAN POME FRUIT IMPROVEMENT PROGRAM LIMITED

ACN 077 345 174



Level 19
Bourke Place
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DX 320

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BJH MJM 464029.1

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This Agreement is dated #

and made

Between

Australian Pome Fruit Improvement Program Limited ACN 077 345 174 of 35 Fourteen Turn Creek, Grove, Tasmania ("APFIP")

and

of # ("the Licensee")

Recitals

- A. Two of APFIP's key objects are to:
 - (iii) develop and promote independent evaluation of pome fruit propagation material for the Australian pome fruit industry; and
 - (iv) develop and promote standards for pome fruit material that will assist the international competitiveness of the Australian pome fruit industry.
- B. APFIP is the owner of all rights in the Trade Mark.
- C. The Trade Mark is #registered as a trade mark pursuant to part 16 of the *Trade Marks Act 1995* (Cth) #registration of the Trade Mark has been sought pursuant to part 16 of the Act (Cth).
- D. The Licensee is a nursery or other similar organisation which has applied for and been granted Approved User status by APFIP in accordance with the Rules.
- E. The Licensee has agreed to use the Trade Mark only in association with Certified Trees, Certified Vegetatively Propagated Rootstocks and/or Certified Seedling Rootstocks.
- F. APFIP has agreed to grant to the Licensee a licence to use the Trade Mark on the terms and conditions of this Agreement.

Terms of this Agreement

1. Definitions and Interpretation

- 1.1 Save for clause 1.2 and unless the context otherwise dictates, where the first letter of a term is a capital letter, that term has the same meaning as prescribed in the Rules.
- 1.2 In this Agreement, including the Recitals, Schedules and Annexures, unless the context otherwise requires,:

“Agreement” means this licence;

“Bureau” means the Australian Bureau of Statistics;

"Commencement Date" means the date of this Agreement;

"Control" in relation to a person or entity means direct or indirect control of that person or entity, including control that is exercisable as a result of or by means of arrangement or practices, whether having legal or equitable force and whether or not based on legal or equitable rights;

"Fee" means the fee payable pursuant to clause 6;

“Review Date” means each date during the Term which is an anniversary of the Commencement Date;

“Rules” means the rules governing the use of the Trade Mark (a copy of which has been given to the Licensee); and

“Term” means 5 years from the Commencement Date.

1.3 In this Agreement, including the Recitals, Schedules and Annexures, unless the context otherwise requires -

- (a) a word denoting the singular includes the plural and vice versa;
- (b) a word denoting an individual or person includes a corporation, firm, authority, government or governmental authority and vice versa;
- (c) a word denoting a gender includes all genders;
- (d) a reference to a recital, clause, schedule or annexure is to a recital, clause, schedule or annexure of or to this Agreement;
- (e) a reference to any party to this Agreement, or any other document or arrangement, includes that party's executors, administrators, substitutes, successors and permitted assigns;
- (f) headings are for convenience of reference only and do not affect interpretation; and
- (g) where an expression is defined, another part of speech or grammatical form of that expression has a corresponding meaning.

2. **Condition Precedent for Grant of Licence**

A Licence shall only be granted by APFIP if APFIP has determined that the Licensee is an Approved User in accordance with clause 6 of the Rules.

3. Grant of Licence

- 3.1 Subject to clause 2, APFIP grants to the Licensee a non-exclusive licence to use the Trade Mark in Australia on the terms and conditions of the Rules and this Agreement.
- 3.2 Section 26 of the Act does not apply.
- 3.3 The Licensee acknowledges that it will be bound by the Rules.

4. The Rules

Subject to the law, this Agreement is subject to the Rules. Where there is an inconsistency between this Agreement and the Rules, the Rules shall prevail to the extent of the inconsistency.

5. Term

This Agreement commences on the Commencement Date and shall continue in full force for the Term.

6. Fee

Subject to clause 7 and in consideration of the grant of the Licence and the issuing of a Certification Tag, the Licensee shall pay to APFIP a fee of:

- (a) \$0.35 for each Certification Tag issued in respect of each nursery Tree; and/or
- (b) \$10.00 for each Certification Tag issued in respect of each Rootstock Bundle.

7. Review of Fee

- 7.1 The Fee to apply from each Review Date shall be an amount calculated as follows:

$$A = M \times \frac{N}{D}$$

where:

- A is the Fee to apply from the Review Date;
- M is the Fee payable immediately prior to the Review Date;
- N is the Consumer Price All Groups Index for Melbourne published by the Bureau in respect of the quarter ending immediately prior to the Review Date; and
- D is the Consumer Price All Groups Index for Melbourne published by the Bureau in respect of the quarter ending immediately prior to the last preceding Review Date or in the case of the first review of the Fees,

the quarter ending immediately prior to the Commencement Date of this Agreement,

provided that:

if the Bureau amends the reference base of the Consumer Price All Groups Index for Melbourne then, to preserve continuity of calculation, N shall be adjusted arithmetically to make N at the Review Date correspond with the reference base to D; and

if the Bureau ceases to calculate or publish the Consumer Price All Groups Index for Melbourne, there shall be substituted an index agreed upon by APFIP and the Licensee or, in default of agreement, selected by an expert appointed by the President of the Law Institute of Victoria as an index which most closely reflects changes in the cost of living in the City of Melbourne. All costs incurred in selecting an index as aforesaid shall be borne equally by the parties.

7.2 Until the Fees payable by applying clause 7.1 have been determined, The Licensee shall pay to APFIP the Fees as determined for the previous year.

7.3 Within 14 days of the publication of N by the Bureau, the Licensee shall pay to APFIP the amount (if any) which equals the difference between the Fees actually paid since the Review Date and the Fees calculated as payable for such period by applying clause 7.1.

8. **Sub-Licensing and Assignment**

8.1 The Licensee shall not sub-licence the right to use the Trade Mark.

8.2 The Licensee shall not assign any rights under this Agreement except with the prior written consent of APFIP, which consent may be given or withheld at its absolute discretion and subject to any terms and conditions that APFIP thinks fit.

8.3 Subject to the Act, APFIP may, at its absolute discretion, assign the right to use the Trade Mark.

9. **Infringement**

9.1 The Licensee shall immediately give written notice to APFIP of any infringement or threatened infringement of the Trade Mark which may come to the Licensee's knowledge.

9.2 APFIP may, at its sole and unfettered discretion, institute or defend any legal proceedings for infringement of or otherwise relating to the Trade Mark.

9.3 APFIP is under no obligation to institute or defend any legal proceedings whether for infringement of or otherwise relating to the Trade Mark.

Rules Governing the Use of a Certification Trade Mark

9.4 If APFIP takes any proceeding in respect of any infringement of the Trade Mark, the Licensee shall do all things and give all assistance as reasonably may be required to assist APFIP taking that proceeding.

9.5 Any damages or compensation arising from that proceeding shall be paid to and held solely for the benefit of APFIP.

9.6 The Licensee shall not institute or defend any legal proceedings for infringement of or otherwise relating to the Trade Mark.

10. **Rights in Trade Mark**

10.1 The Licensee acknowledges that APFIP owns all rights in the Trade Mark.

10.2 Any and all goodwill which accrues from the use the Trade Mark by the Licensee shall accrue for the benefit of APFIP.

10.3 The Licensee shall not -

(a) breach, or encourage or permit any breach of, the rights in the Trade Mark;

(b) challenge APFIP's rights in, or ownership of, the Trade Mark; or

(c) use the Trade Mark for purposes outside the scope of this Agreement.

10.4 APFIP shall pay all renewal and other fees necessary to maintain the registration of the Trade Mark.

11. **Licensee's Obligations and Warranties**

11.1 The Licensee shall not attempt to register or use any trade mark, business name, corporate name or style or get up which is substantially identical or similar in any way to the Trade Mark except with the prior written approval of APFIP.

11.2 The Licensee shall use the Trade Mark in accordance with the terms and conditions of this Licence and shall comply with all reasonable directions issued by APFIP from time to time regarding the manner of use of the Trade Mark.

11.3 The Licensee must not use any trade mark, logo or name in conjunction with the Trade Mark except with the prior written approval of APFIP.

11.4 The Licensee will use its best endeavours to preserve the value and validity of the Trade Mark and in particular will -

(a) endeavour to create, promote and retain the goodwill in the business relating to the production, marketing and sale of Certified Trees and Certified Rootstocks; and

- (b) not use the Trade Mark in such a manner that the goodwill in the Trade Mark is diminished.
- 11.5 The Licensee will not apply to revoke or de-register the Trade Mark or contest the validity of the Trade Mark.
- 11.6 The Licensee warrants that it:
 - (a) is not in default under its constitution (if any) and any replaceable rules or any statute (including, but not limited to the *Plant Breeder's Rights Act 1994* (Cth)) or under any decree, order, rule, by-law or regulation of any government, statutory, municipal body or organisation having jurisdiction over the Licensee or its business and the entering into this Agreement will not result in a contravention of any of the foregoing;
 - (b) holds all licences, permits, authorisations and consents required for the conduct of all aspects of its business and to the best of the knowledge of the Licensee all such licences, permits and authorisations required by the it are in full force and effect;
 - (c) shall only use the Trade Mark in association with Certified Trees or Certified Rootstocks; and
 - (d) shall comply with the Rules at all times.

12. Termination

APFIP may terminate this Agreement by notice in writing to the Licensee in any of the following circumstances:

- (a) the non-payment of any Fees which are due to APFIP by the Licensee and are unpaid within 30 days from the date those Licence Fees were due and payable;
- (b) the Licensee -
 - (i) stops or suspends payment of all or a class of its debts; or
 - (ii) is insolvent or bankrupt;
- (c) an application or order is made, proceedings are commenced, a resolution is passed or proposed in a notice of meeting or an application to a court or other steps are taken for the dissolution of the Licensee or for it to enter an arrangement, compromise or composition with or assignment for the benefit of its creditors or any of them;
- (d) there is a material change in Control of the Licensee;

- (e) the Licensee commits a material breach of this Agreement and, if the breach is capable of being remedied, the Licensee fails to remedy the breach within 14 days after being required to do so;
- (f) fraudulent conduct by the Licensee, including conduct in connection with its application for the granting of this Licence pursuant to the Rules, including a wilful and material falsification or error by the Licensee of any report, statement or other written data furnished to APFIP;
- (g) the Licensee conducting its business in any way that endangers public health or safety;
- (h) the Licensee voluntarily abandoning its business;
- (i) the Licensee agreeing to terminate this Agreement;
- (j) the Licensee, or a member of its staff, is convicted in a court of law of an offence where, in the reasonable opinion of APFIP, that conviction materially and adversely affects APFIP or the good name, goodwill or good reputation of APFIP or the Trade Mark;
- (k) the Licensee fails to comply with or is breach of the Rules (including, but limited to clauses 3, 4, 5 and 8);
- (l) where APFIP is not satisfied that the Licensee is using the Trade Mark exclusively in association with Certified Trees and/or Certified Rootstocks; or
- (m) the Licensee is in breach of clause 11.

13. **Consequences of Termination**

13.1 Upon termination under clause 12 for any reason, the Licensee shall immediately

- (a) cease using the Trade Mark in any way; and
- (b) either destroy or return to APFIP all relevant packaging bearing the Trade Mark including, but not limited to, all Certification Tags which have previously been issued.

13.2 The Licensee shall not be relieved of any obligation to make payments of Fees under clause 6.

13.3 The termination of this Agreement will be without prejudice to any other rights of APFIP under this Agreement prior to the date of termination, including the right to pursue all remedies available to APFIP at law or in equity.

14. Indemnities and Product Liability

14.1 The Licensee shall be liable for and shall indemnify and will keep indemnified APFIP, its servants, agents and employees, from and against any and all liabilities, losses, damages, costs, legal costs, professional and other expenses of any kind whatsoever incurred or suffered by APFIP whether direct or consequential (including but without limitation to any economic loss of other loss of profits, business or goodwill) arising out of any dispute or contractual, tortious or other claims or proceedings brought against APFIP by a third party claiming relief against APFIP arising directly or indirectly from the Licensee's use of the Trade Mark or Trees or Rootstocks which are selected, maintained and/or produced by the Licensee.

14.2 The Licensee acknowledges that the grant of this Licence does not constitute a warranty or guarantee by APFIP that:

(a) Trees or Rootstocks are:

(i) free of the Viruses of any other viruses;

(ii) free of the Pests and Diseases or any other pests and diseases; or

(b) use of any Trees, Rootstocks and/or Scion/Budwood is in any way compliant with or authorised under any law including but not limited to, *the Plant Breeders' Rights Act (Cth) 1994*.

14.3 APFIP does not by the grant of this Licence or by approval of any product, accept any liability to the Licensee or any other party for any damage, loss or injury caused as a result of the use of any product (including the Trees and Rootstocks).

15. Notices

15.1 Any notice, demand, consent or other communication ("the Notice") given or made under this Agreement shall be in writing and shall be given by one of the following means:

(a) by delivering it to the address of the party on a business day during normal business hours;

(b) by sending it to the address of the party by pre-paid first class post;

(c) by sending it by facsimile transmission to the facsimile number of the party; or

(d) by sending it by electronic mail to the e-mail address of the party.

15.2 A notice shall be taken to be duly given and received -

(a) in the case of delivery, when delivered;

- (b) in the case of pre-paid first class post, five business days after the date of posting;
- (c) in the case of facsimile, on receipt by the sender of a transmission report from the dispatching machine showing the relevant number of pages, the correct destination facsimile machine number and that the transmission was successful; and
- (d) in the case of electronic mail, on acceptance by the recipient,

provided that if, in accordance with this sub clause, any such notice, demand, consent or other communication would otherwise be deemed to be given or made outside the recipient's working hours, such notice, demand, consent or other communication shall be deemed to be given or made at the start of the recipients normal working hours on the next business day.

15.3 For the purposes of this clause 15.3, the addresses of the parties shall be as follows:

In the case of APFIP –

Australian Pome Fruit Improvement Program Limited
35 Fourteen Turn Creek Road
Grove
TASMANIA 7109
Fax #
E-mail #
Attention: National Coordinator

In the case of the Licensee

Fax #
E-mail #
Attention: #

15.4 A party may notify the other part to this Agreement of a change to its name, relevant addressee, address, facsimile number or e-mail address for the purposes of this clause 15 provided that such notification shall only be effective on:

- (a) the date specified in the notification as the date on which the change is to take place; or
- (b) if no date is specified or the date specified is less than five business days after the date on which notice is given, the date falling five business days after notice of any such change has been given.

16. **Variation**

This Agreement may be amended or varied from time to time by agreement in writing signed by the parties.

17. **Waiver**

The failure of any party at any time to require performance of the other party of a provision of this Agreement shall not constitute a waiver of that party's rights under the Agreement.

18. **Relationship of the Parties**

Nothing contained in this agreement shall constitute or be deemed to constitute the parties as partners or joint venture parties and the Licensee shall have no power to incur any obligations on behalf of APFIP in any manner whatsoever.

19. **Dispute Resolution**

19.1 If any dispute arises between the parties to this Agreement as to the construction of this Agreement or as to any matter or thing of whatever nature arising under or in connection with this Agreement then such dispute shall, unless resolved within 21 days from the date on which notice of the dispute is given by a party, be referred for mediation in accordance with the *Mediation and Conciliation Rules* for the time being of the Institute of Arbitrators & Mediators of Australia at the request of any party to the dispute, to:

a mediator agreed on by the parties to the Dispute; or

if the parties to the Dispute are unable to agree on a mediator within seven days of the expiry of such notice, a mediator appointed by the then current the President of the Law Institute of Victoria or a person of an equivalent position at an equivalent organistaion of another State as determined by APFIP at APFIP's sole and unfettered discretion,

provided that the mediation is commenced within seven days of the referral or such later time as agreed by the parties to the Dispute.

20. **GST**

20.1 The value of any consideration payable or to be provided by a party under or in connection with this Agreement is the value for GST purposes of any taxable supply to which that consideration relates.

20.2 Unless expressly provided to the contrary in this Agreement, any consideration payable or to be provided by a party under or in connection with this Agreement:

(a) stated as a figure, is stated exclusive of GST; or

(b) described (by formula or otherwise), is described and must be calculated without regard to GST.

20.3 Where this Agreement requires a party ("the first party") to provide consideration to any other party ("the second party") in respect of a taxable supply made or to be made by the second party, the second party may, subject to issuing a valid tax invoice, recover at the same time (or at such later time as a valid tax invoice is presented) from the first party an additional amount on account of GST, such amount to be calculated by multiplying the consideration payable or to be provided by a party in respect of such taxable supply by the prevailing GST rate.

20.4 For the purposes of this clause 20:

(a) "GST" means GST within the meaning of the GST Act; and

(b) "GST Act" means *A New Tax System (Goods and Services Tax) Act 1999* (as amended)

21. **Severance**

If any provision of this Agreement is found to be unenforceable or invalid, the validity of the remaining provisions shall not be affected.

22. **Entire Agreement**

This Agreement constitutes the entire agreement between the parties with respect to the subject matter in this Agreement and supersedes all previous communications, representations, involvements and undertakings (including any previous licence agreement) between the parties or their respective officers or agents.

23. **No Merger**

The rights and obligations of the parties in respect of agreements, indemnities, covenants and warranties contained in this Agreement shall remain in full force and effect, be continuing agreements, indemnities, covenants and warranties and not be merged or extinguished by or upon termination of, or completion of any obligations under, this Agreement.

24. **Applicable Law or Jurisdiction**

24.1 Regardless of the place of performance or otherwise, this Agreement shall be governed by the laws of the State of Victoria and the Commonwealth of Australia and each party submits to the non-exclusive jurisdiction of courts exercising jurisdiction in Victoria and the Commonwealth of Australia in connection with matters concerning this Agreement.

24.2 This clause is without prejudice to or limitation to the rights of APFIP to commence proceedings or other action the Licensee in any jurisdiction.

25. **Costs**

Each party shall pay its own legal and other costs and expenses in connection with the preparation of this Agreement, except that any stamp duty payable on the Agreement shall be paid by the Licensee.

EXECUTED by **AUSTRALIAN POME FRUIT IMPROVEMENT PROGRAM LIMITED ACN 077 345 174** in accordance with the *Corporations Act 2001* by being signed by the following officer(s):

..... Director
..... Director/Company Secretary

OR

..... Sole Director and Sole Company Secretary

EXECUTED by **# PTY LIMITED ACN #** in accordance with the *Corporations Act 2001* by being signed by the following officer(s):

..... Director
..... Director/Company Secretary

OR

..... Sole Director and Sole Company Secretary